99th Congress
2d Session

COMMITTEE PRINT

S. PRT.
99-156

OFFICE OF MANAGEMENT AND BUDGET INFLUENCE ON AGENCY REGULATIONS

MAY, 1986

Printed for the use of the Senate Committee
on Environment and Public Works

U.S. GOVERNMENT PRINTING OFFICE

57-709 O

WASHINGTON : 1986

For sale by the Superintendent of Documents, Congressional Sales Office
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CONTENTS

	Page
Letter of transmittal	V
Preface	VII
Introduction	IX
Executive summary	XI
Budget review tools	XI
Executive Order 12498	XII
Executive Order 12291	XIII
Paperwork Reduction Act	XIV
Collective impact of OMB's expanded powers	XIV
Office of Management and Budget Influence on Agency Regulations	1
Executive Order 12291	2
OMB role	3
EPA rules reviewed by OMB under Executive Order 12291	6
Length of OMB review	9
Executive Order 12498	10
Scope	10
Current status	12
Current "sunshine" provisions and implementation	13
Administrative Procedure Act	13
Record keeping requirements	13
Ex parte communications	14
Intragovernmental communications	15
Comparison of internal agency policies on public access to the regulatory decisionmaking process	16
EPA	16
FDA	18
OSHA	18
OMB staff expertise	18
Selected case studies: Inappropriate OMB intervention in agency rulemaking	22
EPA	22
Asbestos	22
Drinking water standards	26
Storage of hazardous waste in tanks	26
National Priorities List	27
Examples of rules delayed by OMB review	28
Iron and steel effluent guidelines	29
High level radioactive waste disposal	29
National ambient air quality standards for particulate matter	30
New source performance standards	30
OSHA	32
Ethylene oxide	32
Safety rule for oil and gas drilling	32
FDA	34
Infant formula	34
Appendix A, Selected EPA Rules Identified as Having Problems With OMB Review	35
Appendix B, EPA's Proposed Asbestos Ban and Phasedown Rules	41
Appendix C, Administration Review of Agency Regulatory Programs	57

CHARTS AND TABLES

Table A: Major/Non-Major EPA Rules Reviewed Under Executive Order 12291	7
Table B: Disposition of EPA Rules Reviewed Under Executive Order 12291	8
Chart: Office of Management and Budget Organization	21
Table C: Critique of EPA Proposed Asbestos Rules	25

LETTER OF TRANSMITTAL

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United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510

February 19, 1986

The Honorable Robert T. Stafford
Chairman
U.S. Senate Committee on Environment
and Public Works
133 Hart Building
Washington, DC 20510

Dear Mr. Chairman:

Enclosed is a report recently completed by the staff of the Subcommittee on Toxic Substances and Environmental Oversight on the role which the Office of Management and Budget plays in the development and implementation of environmental and other regulations.

This letter is to request that the report be printed as a Committee document so that it will be available to the public.

This report was prepared at our request for the purpose of clarifying the increasingly important role which the Office of Management and Budget is playing in the implementation of virtually all Federal laws designed to protect the public health, welfare and environment. Although the Committee on Environment and Public Works has held hearings on this subject in the past, as have other Committees of the Congress, the powers of OMB have increased dramatically during the past several years. With the accretion of power at OMB, several Senators, including both yourself and Senator Bentsen, have expressed concern over the dangers inherent in lodging decision-making authority in officials who are unaccountable to either the public or the Congress.

The report suggests that a combination of powers created through law and Executive Order has lodged in the Office of Management and Budget the power to run virtually the entire regulatory program of the Federal government. Decisions made by and at OMB are not subject to either public scrutiny or effective Congressional oversight because none of the many laws created to assure fairness and openness apply. While there is no concrete evidence that either these or other laws have been violated, neither can there ever be any assurance to the contrary because

of the cloak of secrecy and executive privilege which protects OMB officials and their decision-making processes.

The interplay of inherent executive powers and statutory authorities creates a confusing web of authority which OMB exercises over other Federal agencies. The staff report attempts to explain the sources of the powers and explain, based on case histories which have been revealed in news accounts of Congressional inquiries, how and why OMB dictates the content and nature of regulations. Although the report could only focus on a limited number of these authorities and cases because of time limitations, it is still likely to be a valuable resource document to the Congress, the public and the press. To the best of our knowledge, when this report was begun, it was the first attempt to systematically review and organize this information.

We hope that upon review you will agree with our judgment that the staff report should be printed. Thank you in advance for your consideration of this request.

Sincerely,

Max Baucus
Ranking Minority Member

David Durenberger
Chairman

PREFACE

Shortly after this report was completed, a United States District Court decision was issued in the *Environmental Defense Fund* v. *EPA and OMB** suit described in the case study "Storage of Hazardous Waste in Tanks" (page 26). The decision is significant because it is the first such decision to address directly the question of OMB interference in agency rulemaking, and because its findings confirm some of the major concerns raised in this report and elsewhere: OMB's ability to use Executive Order 12291 to substantively influence agency regulations and to delay their promulgation is inappropriate encroachment upon congressional legislative authority and upon agency independence and expertise.

> [I]t seems clear that OMB did contribute to the delay in the promulgation of the regulations by insisting on certain substantive changes . . . . A certain degree of deference must be given to the authority of the President to control and supervise executive policymaking. *Sierra Club* v. *Costle*, 657 F. 2nd 298, 405 (D.C. Cir. 1982) (regarding whether oral communications between EPA and the White House must be docketed on the rulemaking record when EPA revises Clean Air Act provisions). Yet, the use of EO 12291 to create delays and to impose substantive changes raises some constitutional concerns. Congress enacts environmental legislation after years of study and deliberation, and then delegates to the expert judgment of the EPA Administrator the authority to issue regulations carrying out the aims of the law. Under EO 12291, if used improperly, OMB could withhold approval until the acceptance of certain content in the promulgation of any new EPA regulation, thereby encroaching upon the independence and expertise of EPA. Further, unsuccessful executive lobbying on Capitol Hill can still be pursued administratively by delaying the enactment of regulations beyond the date of a statutory deadline. This is incompatible with the will of Congress and cannot be sustained as a valid exercise of the President's Article II powers. (p. 9)

The court ruled that OMB has no authority to delay promulgation of the final tank rule which was the subject of the suit, or to delay the promulgation of other EPA regulations subject to statutory or judicial deadlines under the Hazardous and Solid Waste

Environmental Defense Fund v. *Lee M. Thomas, Administrator, U.S. Environmental Protection Agency, et al.*, U.S. District Court for the District of Columbia, Civil Action No. 85-1747, filed January 23, 1986.

Amendments of 1984. The decision is important because it places limits on OMB review of regulations subject to statutory or judicial deadlines, reinforcing the intent of Congress in passing the 1984 Amendments, and reinforcing the section of Executive Order 12291 (which OMB has virtually ignored) allowing an exemption from OMB review for regulations subject to such deadlines. The decision further states that the ruling "is not an inappropriate interference with the interaction of executive agencies; all such interaction may continue absent a 'conflict with deadlines by statute or by judicial order.' Sec. 8, EO 12291." (p. 13)

INTRODUCTION

This document was prepared as a background paper on the role of the Office of Management and Budget (OMB) in executive branch agency rulemaking. Although the original impetus was the issuance in January 1985 of Executive Order 12498, and the resulting President's Regulatory Program, the scope of the paper also includes a description and informal assessment of OMB review of regulations under Executive Order 12291, and a brief description of other OMB authorities.

Because the first annual President's Regulatory Program was published after the research for this paper was completed, the important issues of the extent to which "significant" proposed agency actions were modified or excluded from the published list for reasons of inconsistency with Administration policy must be the subject of a separate, future analysis. In addition, the paper does not document OMB's implementation, under the Paperwork Reduction Act, of its information collection control powers and their effect on the development and implementation of agency regulations. The Paperwork Reduction Act provides OMB with its only explicit nonbudgetary statutory authority to review individual agency actions. OMB is the ultimate decisionmaker and its decisions must be on the record. OMB reviews under the Paperwork Reduction Act should therefore be the subject of further review.

Even though thorough analysis of OMB's use of the Paperwork Reduction Act and of the first regulatory program under Executive Order 12498 are not included in its scope, the paper presents convincing evidence of increasing potential for off-the-record OMB influence of agency rulemaking decisions. Executive Orders 12498 and 12291 together effectively exert a "cradle to grave" influence over the agency rulemaking process and there is widespread concern that the secrecy and delay imposed by OMB compromise the principles of openness and fairness under which agencies strive to develop their regulations. Furthermore, the combined effect of the two Executive Orders with OMB's multiple other authorities, most significantly, authority to review the President's budget and oversee its execution, has had the effect of reducing the power of Congress relative to OMB and the White House over agency implementation of a broad range of statutes.

EXECUTIVE SUMMARY

In the last five years, the ability of the Office of Management and Budget (OMB) to influence agency regulatory decisionmaking has increased dramatically. OMB has had longstanding authority to review agency budgets,[1] publications,[2] draft legislation,[3] and testimony before Congress on agency budgets and proposed legislation;[4] to apportion and reapportion agency funds;[5] to approve agency requests to Congress to reprogram funds from one budget subaccount to another;[6] and to set agency personnel ceilings.[7] In addition, since 1980 OMB has acquired authority to screen agency information collection requests[8] (many of which are critical to effective implementation of agency regulatory programs), to review individual proposed and final rules and regulatory impact analyses,[9] and to participate in setting agency regulatory agendas.[10] One former OMB official with extensive experience in the agency's budget and regulation review activities has observed, "The Government works using three things: money, people, and regulations; the agency must get all three through OMB."[11]

Budget Review Tools

OMB's most obvious means of influencing agency operations is its authority, first granted (to the Bureau of the Budget) by the Budget and Accountng Act of 1921, to review agency budget submissions and to prepare the President's budget for Congress. Agency budget justifications are subjected to close scrutiny and the changes which OMB makes in its passback to the agency are detailed and often targeted to the reduction or elimination of specific programs.[12]

Equally important, but usually less visible, is OMB's continuing influence over agency programs through the budget execution proc-

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[1] Budget and Accounting Act of 1921.

[2] OMB Circular A-3, revised on May 2, 1985, sets up a publication review process focused on the cost and number of agency publications.

[3] OMB Circular A-19.

[4] *Ibid.*

[5] Antideficiency Act, 31 U.S.C. §§ 1341(a), 1342, 1349(a), 1350, 1351, 1511-1519 (1982).

[6] OMB Circular A-11, Agency Clearance of Budget Materials for Congress and the Media.

[7] OMB Circular A-64 (revised): Position Management Systems and Employment Ceilings.

[8] Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520 (1982).

[9] Executive Order 12291, February 17, 1981, 3 C.F.R. 127, 1982, reprinted in 5 U.S.C. 601 note.

[10] Executive Order 12498, January 4, 1985, 50 *Federal Register* 1036 (1985).

[11] Interview by Erik Olson with Jim Tozzi, former Deputy Administrator of the OMB Office of Information and Regulatory Affairs (OIRA), June 14, 1983, cited in Erik Olson's "The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12291," *Virginia Journal of Natural Resources Law*, Vol. 4:1 (Fall 1984), p. 6, note 6. (Hereafter cited as Olson.)

[12] The Environmental Protection Agency budget passback for fiscal year 1983 eliminated the operating budget of the noise pollution control program (Olson, p. 6, note 7).

ess. OMB's authority to apportion and reapportion agency funds allows it to exert control over the pace at which agency funds are spent through the fiscal year, and, in cases where Congress has appropriated a lump sum for a program, to specify the amounts allocated to each subaccount. In addition, OMB's ability to approve or disapprove an agency request to Congress for supplemental funds or a request to reprogram funds from one budget subaccount to another constitutes a significant constraint on agency flexibility to carry out discretionary duties and ability to implement the law even where the duty is mandatory.[13]

Both OMB's review of proposed agency budgets and, less directly, its ability to exercise control over the execution of those budgets, allow OMB to restrict or eliminate funds agencies plan to spend for mandatory activities or for discretionary activities such as conducting research which may lead to a rulemaking, developing a proposed rule, collecting sampling data to sustain a rule, and other rulemaking and prerulemaking activities.

Executive Order 12498

Executive Order 12498,[14] issued January 4, 1985, established for the first time a formal OMB role in agencies' internal regulatory planning processes. The order directs Executive Branch agencies [15] to submit to OMB a draft regulatory program describing agency policies, goals and objectives for the coming year, and listing "significant" [16] planned rulemaking and prerulemaking activities.[17]

The definition of "prerulemaking activity" is sufficiently broad to extend OMB's review to agency actions ordinarily considered within the administrative discretion of the Administrator of the Environmental Protection Agency (EPA). Some OMB-generated examples of "significant prerulemaking activities" are "the decision to create an agency task force to evaluate the need for a regulation that, if proposed, would be a 'significant regulatory action' . . . or to analyze health and safety risks concerning a hazard the regulation of which would be 'significant.'"[18]

The standard of review to be used by OMB is "consistency of the draft regulatory program with the Administration's policies and priorities and the draft regulatory programs submitted by other agencies."[19] OMB is also directed to "identify such further regula-

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[13] For example, OMB refused to approve EPA's request for supplemental funds for fiscal year 1985 to implement the 1984 RCRA Amendments and directed the Agency instead to reprogram funds from existing program activities.

[14] *Federal Register*, Vol. 50, No. 5, January 8, 1985, pp. 1036–1038.

[15] Department of Agriculture; Department of Commerce; Department of Education; Department of Energy; Department of Health and Human Services; Department of Housing and Urban Development; Department of Interior; Department of Justice; Department of Labor; Department of Transportation; Department of Treasury; Environmental Protection Agency; Equal Employment Opportunity Commission; General Services Administration; Office of Personnel Management; Small Business Administration; Veterans Administration.

[16] OMB Bulletin 85-9 defines a "significant regulatory action" as a prerulemaking or rulemaking action leading to a rule which is a major rule, an agency priority, subject to a statutory or judicial deadline, of unusual interest to other Federal agencies or to the public, likely to establish a new policy or legal precedent, or *so designated by the Director of OMB* (Sec. 5(c). [Emphasis added.]

[17] Sec. 2, Executive Order 12498.

[18] Executive Order 12498, Bulletin No. 85-9, Attachment 1.

[19] Sec. 3(a)(i), Executive Order 12498.

tory or deregulatory actions as may, in [the Director's] view, be necessary in order to achieve such consistency."[20] Finally, if agencies plan to take additional regulatory actions during the planning year, these actions must be submitted to OMB for review and the agency may not act until the review is completed.[21]

Under Executive Order 12498, OMB thus has the opportunity to play a controlling role in setting agency regulatory agendas, both in determining the content of the agenda (by deleting or modifying agency items and by adding regulatory or deregulatory actions), and by its ability to prevent an agency from taking even a "prerulemaking" action which is deemed inconsistent with Administration policies.

Executive Order 12291

Executive Order 12291,[22] issued February 17, 1981, sets forth procedures and cost/benefit criteria for OMB review of proposed and final rules and, for major rules,[23] regulatory impact analyses submitted by agencies subject to the order.[24] Under Executive Order 12291, OMB is authorized to review major and minor rules and to return for agency reconsideration, any rule which does not meet the positive benefit/cost ratio required by the Executive order.

Under Executive Order 12291 OMB has, in effect, unlimited time to review agency rules and can require modifications of individual rules to make them consistent with the order's cost/benefit criteria. The order states that agencies shall not publish proposed rules until OMB has completed its review and shall not publish final regulatory impact analyses or final rules until the agency has responded to OMB's views and included these views and the agency response in the rulemaking file.[25] Although the Executive order states that the above language "shall [not] be construed as displacing the agencies' responsibilities delegated by law,"[26] former EPA officials report that their inability to use the benefit/cost test has been a cause of conflict between OMB and EPA in the case of statutes where cost considerations are prohibited (as they are for primary National Ambient Air Quality Standards issued under the Clean Air Act).

OMB's "review" authority under the order is, in effect, authority to approve or disapprove agency rules. A current OMB official, in referring to his action with respect to an EPA rule, stated that he "approved" the rule.[27] This authority gives the OMB official, a po-

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[20] *Ibid.*

[21] Sec. 3(c), Executive Order 12498; OMB issued guidance to affected agencies clarifying this position ("Actions not included in the Federal Regulatory Program Under Executive Order No. 12498," Memorandum to the Heads of Certain Executive Departments and Agencies from Douglas H. Ginsberg, Administrator, Office of Information and Regulatory Affairs, OMB, May 29, 1985. (Document on file.)

[22] *Federal Register*, Vol. 46, No. 33, February 19, 1981, pp. 13193-13198.

[23] Defined as a rule having an annual impact on the national economy of $100 million or more, a major increase in costs or prices for a particular sector of the economy, specific adverse economic effects, or a rule designated as major by the Director of OMB.

[24] For agencies covered by Executive Orders 12498 and 12291, see note 15.

[25] Sec. 3(f)(1-3), Executive Order 12291.

[26] Sec. 3(f)(3), Executive Order 12291.

[27] Conversation with anonymous OMB official "B", June 1985.

litical appointee who is not confirmed by the Senate, equal power in his dealings with agency heads, who are required to be publicly accountable for their actions.

Paperwork Reduction Act

OMB's only nonbudgetary review authority specifically enacted in law is the Paperwork Reduction Act of 1980,[28] which, among other provisions, authorizes OMB to review and approve agency requests for new collections of information in order to achieve an overall reduction of the paperwork burden imposed on States and private parties by the Federal Government.[29] Since initial regulatory decisions and the implementation of agency regulatory activities often depend heavily on such data, OMB's delay or modification of such requests can have substantial impact on agency regulatory programs, including limiting the agency's ability to defend the need for a regulation by developing additional data.

The Paperwork Reduction Act created OMB's Office of Information and Regulatory Affairs (OIRA) to implement the Paperwork Act. OMB has also used OIRA to implement the two executive orders. As one observer of OMB points out, "OMB has vigorously pursued paperwork reduction, but has been very slow to fulfill the other information policy purposes of the Act." [OMB] has concentrated its efforts on deregulation, and used the information clearance process to monitor and reduce regulations."[30] Despite this use of the Paperwork Reduction Act, OMB itself has admitted that the "[L]egislative history is clear that Congress did not intend the Paperwork Reduction Act to be a 'regulatory reform' bill."[31] However, Christopher DeMuth, former Administrator of OIRA has stated:

> [OMB's] Responsibilities under the Paperwork Reduction Act and Executive Order 12291 are completely intertwined, both in terms of staff and use of funds . . . [O]ur oversight of information resources management and agency regulatory activity reflect the same policy concerns—to reduce burdens on the private sector, and to encourage agencies to seek the least burdensome alternatives, consistent with the law, to achieve these objectives.[32]

Collective Impact of OMB's Expanded Powers

While both Executive orders contain language constraining their effect "to the extent permitted by statute," and the Paperwork Reduction Act and its legislative history contain language specifying that it was not intended to increase OMB authority with respect to

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[28] 44 U.S.C., 3501-3520 (1982).

[29] § 3504.

[30] "OMB Control of Rulemaking: The End of Public Access," David Plocher, OMB Watch, August 1985, p. 12.

[31] OMB, Controlling Paperwork Burdens on the Public, 48 *Federal Register* 13,666, 13,668 (1983) (cited in Olson, p. 20, note 83).

[32] Testimony before the Subcommittee on Federal Expenditures, Research and Rules of the Senate Committee on Governmental Affairs, April 14, 1982, pp. 11, 25.

Agency substantive policy,[33] the collective strength of these authorities, combined with OMB's budget review powers, has supported OMB recommendations which conflict with agency statutory mandates,[34] impede the EPA Administrator's use of his discretionary authority, and delay EPA promulgation of regulations. Most critics of OMB's role in review of agency regulations would support a coordinating and advisory role for Presidential oversight of Federal regulations. What causes concern is the delay, secrecy, lack of accountability (to the public or Congress), and potential for displacement of agency expertise and agency administrative and policy authorities created by current OMB practices.

The OMB decisionmaking process for reviewing agency regulatory programs under Executive Order 12498 occurs before proposal of the rule, which would trigger the public participation and on-the-record justification requirements of the Administrative Procedure Act. In addition, although OMB has made an apparently one-time exception in allowing the 1985 draft regulatory programs to be released to congressional committees, OMB has announced its intention to treat the development of agency regulatory agendas as it does the budget process, with all documents closely held until the final document is released. The process thus is secret, with no opportunity for public participation or access to the basis for decisions, and no record upon which to base congressional oversight. In the role established by Executive Order 12498, OMB may also quash simple *investigations* into health and environmental risks by agency experts; thus OMB now could control agency risk *assessment* (science) before risk *management* (policy) becomes an issue.

OMB's review procedures under Executive Order 12291 have been criticized for allowing off-the-record contacts with private parties, particularly the regulated community. OMB has also been criticized for acting as a conduit for industry critiques of EPA rules, presenting industry analysis as their own. Although the safeguards of the Administrative Procedure Act (APA) apply to proposed rules published after Executive Order 12291 review, there is no expressly stated requirement in the APA that OMB influence on a rule be documented for the record, and much, perhaps all, of the substantive review process at OMB will remain secret.

There are, in effect, no time limits on OMB review of agency rules under either Executive order. In addition, although OMB may extend its review under the Paperwork Reduction Act for up to a total of 90 days,[35] OMB may disapprove an agency information collection request. Although agencies may, and frequently do, resubmit requests, OMB may continue to disapprove and thus delay indefinitely agency action.

At EPA, delay under Executive Order 12291 currently averages 60 days for major and minor rules; review time for a major rule can average over four months, and several rules have been held for over a year. The added volume of prerulemaking and rulemaking activities in agency regulatory programs submitted under Execu-

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[33] Paperwork Reduction Act, 44 U.S.C. § 3518(e), cited in Olson, p. 6, note 10. (See also Olson, p. 20, note 83.)

[34] Particularly with the issuance of health-based national ambient air quality standards (NAAQS) under the Clean Air Act.

[35] § 3507(b), Stat. 2821.

tive Order 12498 will likely add to OMB's delay of rules (and will certainly add to its potential substantive influence). At a minimum, continued delay can be expected, both for policy and for procedural reasons. (See flow chart in Appendix C for an overview of OMB's activities under the two Executive orders.[36]

An internal EPA study summarizes well some of the problems experienced by the agency in the course of OMB's regulatory review (in this case under Executive Order 12291):

> The OMB review, on the other hand, continues to delay the NSPS [New Source Performance Standards] program. The problem is not one of failure in resolving issues that are brought up by OMB. The problem is that *OMB has no incentive whatsoever to keep the process moving and no one to which they are accountable for failures of responsiveness.*
>
> At the present time, OMB can unilaterally extend the comment period on EPA packages. Usually, this is done informally through a telephone call to OPRM [the Office of Policy and Resource Management]. When an extension is requested, the time period is indefinite and lasts until OMB is ready to respond. This can be more than a year. Once a dialogue has begun, OMB tends to repeatedly find new issues each time the last issue is settled, often with long intervening delays. Often, as was the case in the beverage can NSPS [New Source Performance Standards], these issues involve questioning the technical judgment of EPA rather than the implications of costs, benefits, and impacts to society." [37] [Emphasis added.]

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[36] Courtesy of Morton Rosenberg, Congressional Research Service (CRS).

[37] "New Source Performance Standards: Beverage Can Industry—A Case Study," prepared at the request of EPA Administrator William Ruckelshaus by the Emissions Standards and Engineering Division, Office of Air Quality Planning and Standards, Office of Air, Noise, and Radiation, U.S. Environmental Protection Agency, August 23, 1983.

OFFICE OF MANAGEMENT AND BUDGET INFLUENCE ON AGENCY REGULATIONS

Under President Reagan, the regulatory review function of the Office of the President has been extended and consolidated in an increasingly powerful Office of Management and Budget (OMB). Executive Order 12291 established procedures and cost/benefit criteria for OMB review of proposed and final agency regulations. The recently issued Executive Order 12498 is a vehicle for OMB involvement in setting an annual agenda for agency prerulemaking activities (such as studies and requests for public comment on issues identified for possible regulation).

Opportunity for effective implementation of centralized executive branch review of agency regulations has been greatly enhanced by the 1980 Paperwork Reduction Act's [1] creation of the Office of Information and Regulatory Affairs (OIRA) within OMB. With the establishment of this new office, OMB had the institutional capacity to better manage the regulatory review and agenda-setting processes of the two Reagan Executive orders.

In issuing both Executive orders, the President cited his authority under Article II of the Constitution to ensure that Federal laws are faithfully executed and to "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." A handful of judicial decisions, most notably dictum in *Myers* v. *United States,*[2] have asserted the President's authority to supervise his subordinates. The *Myers* case upheld the President's authority to remove an appointee who had been confirmed by the Senate. Several sources [3] point out that the *Myers* decision did not confer upon the President authority to dictate decisions which, are by statute, the specific responsibility of the subordinate. In addition, subsequent Supreme Court decisions suggest that while the President may review his subordinate's decisions, his authority to direct those decisions is limited by the subordinate's own authority, which is determined by Congress.[4]

The Department of Justice memorandum which supported the issuance of Executive Order 12291 used the *Myers* decision as a pri-

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[1] 44 U.S.C. §§ 3501-3520 (1982).

[2] 272 U.S. 52 (1926).

[3] Robert Rauch, "Legal Restrictions on Presidential Interference in EPA Rulemaking," memorandum, Environmental Defense Fund, September 5, 1978. "Deregulation Headquarters: An Interview on the New Executive Order with Murray L. Weidenbaum and James C. Miller, III," *Regulation*, March/April 1981, p. 22. (Cited hereafter as *Regulation* (1981).) Morton Rosenberg, "Beyond the Limits of Executive Control of Agency Rulemaking Under Executive Order 12291, *Michigan Law Review*, Vol 80:193 (December 1981); (hereinafter cited as Rosenberg, *Michigan Law Review* 1981).

[4] *Ibid.*, Rauch.

57-709 O-86--2

mary basis for its justification of the order.[5] Morton Rosenberg, in an article which questions the constitutionality of Executive Order 12291, points out that "the [President's] indirect power of removal [of his subordinates] differs significantly from the order's conception-to-enactment influence over administrative rulemaking, and the Court's opinion nowhere goes so far as to hold that the President may direct the outcome of all decisions specifically committed by statute to a subordinate." [6] Neither, others have suggested, did the Court hold that the President may delegate his authority to supervise the EPA Administrator to another Executive Branch official, such as an OMB desk officer. Rosenberg argues that if the agency function in question is judicial or legislative, as rulemaking arguably is, the President does not have implied constitutional authority of control.

In practice, the orders are ultimately enforceable through the President's ability to remove his appointees from office, but derive their influence in large part from the multiple powers of the Office of Management and Budget: to prevent agencies from taking regulatory action until OMB review is completed, unless the action is subject to the (little used) exemption for emergencies, and statutory and judicial deadlines (Executive Orders 12291 and 12498); to review agency budgets,[7] publications,[8] information collection requests,[9] testimony before Congress on agency budgets and proposed legislation,[10] and draft legislation; [11] to apportion and reapportion agency funds; [12] to approve agency requests to Congress to reprogram funds from one budget subaccount to another; [13] and to set agency personnel ceilings.[14] James C. Miller, Director of OMB, and former Administrator of OMB's Office of Information and Regulatory Affairs, said in a widely quoted 1981 interview, "You know, if you're the toughest kid on the block, most kids won't pick a fight with you. The Executive order [12291] established things quite clearly." [15]

Executive Order 12291

Executive Order 12291[16] was issued on February 17, 1981, and requires, "to the extent permitted by law," a positive benefit/cost ratio and net benefits to be maximized for the promulgation of new regulations and review of existing regulations. The order aims to "reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for Presiden-

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[5] Memorandum of Acting Assistant Attorney General Larry L. Simms, Proposed Executive Order entitled "Federal Regulation," February 13, 1981.

[6] Morton Rosenberg, "Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291," *Michigan Law Review*, Vol. 80:193, December 1981, pp. 207 and 209.

[7] Budget and Accounting Act of 1921.

[8] OMB Circular A-3, revised on May 2, 1985, sets up a publication review process focused on the cost and number of agency publications.

[9] Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520 (1982).

[10] OMB Circular A-19.

[11] *Ibid.*

[12] Antideficiency Act, 31 U.S.C. §§ 1341(a), 1342, 1349(a), 1350, 1351, 1511-1519 (1982).

[13] OMB Circular A-11, Agency Clearance of Budget Materials for Congress and the Media.

[14] OMB Circular A-64 (revised): Position Management Systems and Employment Ceilings.

[15] *Regulation* (1981), p. 22.

[16] 3 CFR 127 (1982, reprinted in 5 U.S.C., 601 note).

tial oversight of the regulatory process, minimize duplication and conflict of regulations, and provide well-reasoned regulations." Under the Executive order, covered agencies [17] are required to send all proposed and final rules to OMB for prepublication review, and are prohibited from proposing a rule until OMB review is complete (sec. 3(c), (f)). There has been only one instance of official appeal of an OMB refusal to approve an agency rule.[18] Although frustrated by OMB delay, agencies have not formally challenged the requirement to submit rules to OMB for review. A little-used exception is provided for emergencies or statutory or judicial deadlines, and must be requested by the agency.

It is important to note that the Executive order's definition of "rule" was broadly written: "An agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or describing the procedure or practice requirements of an agency" (excluding some administrative actions, military or foreign affairs regulations, or regulations related to agency organization management, and personnel) (sec. 1(a)(1-3)). EPA has submitted both agency guidance and policy statements for OMB review under Executive Order 12291.[19]

For each major rule—defined as one having an annual impact on the economy of $100 million or more, other adverse economic impacts, or one so designated by OMB (sec. 1(b); 3(b))—an agency is required to develop, and, "to the extent permitted by law," consider a regulatory impact analysis to implement the benefit/cost criteria set out by the Executive order (sec. 3(a)). In addition, agencies are required to begin review of rules currently in effect and to perform regulatory impact analyses for such major rules; the Director of OMB may also designate specific current rules for review under Executive Order 12291 (sec. 3(i)).

OMB ROLE

The significance of Executive Order 12291 lies in the centralized review procedures which are vested for the first time in OMB, and in the substantive requirement that regulatory benefits must exceed costs. A management case study developed for the Kennedy

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[17] Department of Agriculture; Department of Commerce; Department of Education; Department of Energy; Department of Health and Human Services; Department of Housing and Urban Development; Department of Interior; Department of Justice; Department of Labor; Department of Transportation; Department of Treasury; Environmental Protection Agency; Equal Employment Opportunity Commission; General Services Administration; Office of Personnel Management; Small Business Administration; Veterans Administration.

[18] The Occupational Safety and Health administration appealed OMB's January, 1982 rejection of its hazards communication standard to the Presidential Task Force on Regulatory Relief. On the eve of a congressional hearing, the Task Force postponed a final decision but returned the rule to OSHA for further benefit justification. (Source: cited in Hearings, "Office of Management and Budget Control of OSHA Rulemaking," before a subcommittee of the House Committee on Government Operations, 97th Congress, 2nd Session (1982) and "Workers' 'Right to Know': OSHA's Hazard Communication Rule" (CRS IB 84103, March 1985), Congressional Research Service unpublished documents.)

[19] See *Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, House of Representatives, 98th Congress, 1st Session, on H.R. 2327, Regulatory Reform Act, June and July 1983, Part 1, p. 1561. (Hereafter cited as House Judiciary Subcommittee Hearings on the Regulatory Reform Act.) EPA response to the subcommittee's questionnaire indicating that final rules submitted to OMB included some ". . . Control Technique Guidance (CTGS) and policy statements, all of which are classified as rules under the Executive Order." Included in EPA's "List of Final Rules found to be Inconsistent Under Executive Order 12291," are the NPDES State Program Guidance and the Guidance Manual on Permit Applications (p. 1621).

School of Government at Harvard University (No. C96-85-638) quotes Chris DeMuth, Administrator of OMB's Office of Information and Regulatory Affairs from 1981 to 1984, as stating that "putting the regulatory review process in OMB was part of the Administration's strategy 'to strengthen the hand of the President and his appointed officials vis-a-vis the establishment, the career organization of the agenices, the committee staffs on the Hill and the interest groups—what used to be called the Iron Triangle.'" DeMuth also states that approximately "a fifth to a quarter" of "the regulations we tried to go after" originated at EPA.

Executive Order 12291 is part of a string of White House attempts to control the quality of agency regulations. Beginning with the "Quality of Life" reviews (generally targeted at EPA) in the Nixon administration and continuing in the Ford and Carter administrations with "inflation impact statements" and required "regulatory analyses," these earlier efforts lacked the enforcement mechanism of the formal OMB review procedures set out in the Reagan Executive order, which prohibits the *Federal Register* publication of a proposed rule until OMB review is complete (sec. 3(f)(1)). In the words of one OMB official, the Carter Regulatory Analysis Review Group "didn't have any clout."[20] Indeed, the Carter Executive Order 12044 clearly deferred to agency judgement, stating that agencies' development of new regulatory procedures should meet the minimal requirements set out by the Order, but "should fit [agencies'] own needs" (sec. 2).

OMB has played an important role in review of agency regulation since the Nixon administration's "Quality of Life" reviews. The Carter Administration's Regulatory Analysis Review Group (RARG) did review selected preproposal rules and their accompanying agency-prepared regulatory analyses. However, the system established by Executive Order 12291 broadened the scope of preproposal review to include all rules (of agencies subject to the order), and considerably strengthened the reach and effectiveness of OMB authority. There was no previous provision for OMB prepropsal review of individual rules and OMB was not bureaucratically organized to assume the responsibility, as it is now (using the Office of Information and Regulatory Affairs created in 1980 to implement the Paperwork Reduction Act). Preproposal decisions, now likely to be substantively influenced by OMB, are not covered by the public recordkeeping requirements of the Administrative Procedure Act (APA); thus there is no public record of OMB's preproposal influence on rules submitted for review under Executive Order 12291. In addition, there is often no public record of OMB influence on published final rules, despite a requirement in the Executive order that agencies incorporate OMB views and the agency response in the rulemaking file (sec. 3(f)(2)). A General Accounting Office (GAO) 1982 report noted that "this procedure is not routinely used but rather reserved for those rare cases in which the agency re-

[20] Conversation with anonymous OMB official "A", May 1985.

fuses to accept OMB's informed recommendations."[21] In contrast, the RARG reviews were publicly filed.[22]

OMB's "review" authority under the order is, in effect, authority to approve or disapprove agency rules. A current OMB official, in referring to his action with respect to an EPA rule, stated that he "approved" the rule.[23] This assumed authority gives the OMB official, a political appointee who is not confirmed by the Senate, equal power in his dealings with agency heads, who are required to be publicly accountable for their actions. Although an EPA official reported that substantive changes by OMB are rare, he also said that "there are a small number of unresolved disputes where the agency is *required* to put a regulation on the back burner." [24] [Emphasis added.]

Executive Order 12291 specifically states that it shall not displace agencies' responsibilities delegated by law (sec. 3(f)(3)). However, areas where the agency has discretion, as opposed to statutory mandate, to take a specific regulatory action, are frequent points of dispute with OMB. In addition, the requirement that rules meet a benefit/cost test has delayed agency compliance with statutory deadlines, and has reportedly been the cause of conflict between EPA and OMB in the case of sections of the Clean Air Act where such considerations are prohibited. Critics have asserted that the criteria of the order, in effect, displace agency authority.[25] Similar problems have been experienced by the Food and Drug Administration and the Occupational Safety and Health Administration (see section on case studies below).

There are *no deadlines for OMB's review* of agency rules, although the agency may request that rules subject to statutory or judicial deadlines be exempt from review. The initial time allowed for OMB review is 60 days for proposed major rules and Regulatory Impact Analyses, 30 days for final major rules, and 10 days for minor rules. These times may be extended indefinitely by OMB notice to the agency (except, in theory, for rules subject to statutory and judicial deadlines), and agencies are directed to refrain from publishing proposed or final rules and preliminary or final Regulatory Impact Analyses until they have responded to OMB's views (sec. 3(f)(1) and (2)). EPA has noted that for 73 proposed and 85 final rules reviewed in 1981 and 1982, OMB extended its review "from several days to several months, [and] in two cases . . . to a year or more." [26]

Executive Order 12291 also requires agencies to publish twice a year an agenda of proposed regulations the agencies plan to issue or have issued. The Director of OMB, to the extent permitted by law, may require additional information and publication of the agenda in any form. OMB's role in developing the regulatory

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[21] "Improved Quality, Adequate Resources, and Consistent Oversight Needed if Regulatory Analysis is to Help Control Costs of Regulations," report to the Chairman, Committee on Governmental Affairs, U.S. Senate, by the U.S. Comptroller General, General Accounting Office/PAD-83-6 (November 2, 1982). p. 50.

[22] *Ibid.*, p. 55.

[23] Conversation with OMB official "B", June 1985.

[24] "Monitor—the Powers that Be," *Journal WPCF*, Vol. 57, No. 3, p. 186.

[25] See e.g., Morton Rosenberg, "Beyond the Limits of Executive Control of Agency Rulemaking Under Executive Order 12291," *Michigan Law Review*, Vol. 80:193 (December 1981), p. 215.

[26] House Judiciary Subcommittee Hearings on the Regulatory Reform Act, pp. 1561-1562.

agenda was expanded significantly be Executive Order 12498 (see below).

EPA RULES REVIEWED BY OMB UNDER EXECUTIVE ORDER 12291*

In its annual reports on rules reviewed under Executive Order 12291, OMB maintains the Executive order's distincition between "major" and "non-major" rules. However, this distinction does not produce meaningful statistics, in part because OMB has the authority to designate a minor rule or group of minor rules as "major," and can offer suggestions to substantively modify both major and minor rules. Although the overwhelming majority of EPA rules reviewed by OMB during 1981 to 1984 were "non-major," (i.e., individually they would not have an economic impact of $100 million or more annually, would not have a significant impact on costs or prices for individuals, business, or government, and would not have significant adverse effects on the economy (sec. 1(b)), there is no cumulative measure of their significance in terms of health and environmental protection. For example, several "minor" rules, such as drinking water standards under the Safe Drinking Water Act, and effluent guidelines under the Clean Water Act have the potential to reduce serious health and environmental risks.

OMB has categorically waived regulatory review for some deregulatory actions, such as actions regarding pesticide tolerances ("except those that make an existing tolerance more stringent") deletions from the Clean Water Act section 307(a) list of toxic pollutants, and suspensions of toxic testing requirements under the National Pollution Discharge Elimination System.[27]

OMB has made changes in an increasing proportion of EPA rules reviewed. (See Table B.) EPA's response to a House Judiciary Committee questionnaire concerning agency reaction to OMB regulatory review comments indicates that "most modifications [in 1981 and 1982] were to the preamble or presentation of proposed rules."[28] The first three OMB annual reports clustered the changed rules in a category called "consistent with minor change." However, these changes could have ranged from small grammatical changes to substantial redirection or new alternatives for the rule, and OMB dropped the appellation "minor" in its 1984 report. According to one former OMB Office of Information and Regulatory Affairs desk officer (i.e., analyst), these OMB changes may have a significant impact on the effectiveness of the rule in protecting human health and the environment.

Significant changes—those which EPA staff deem to have important environmental or public health impacts, or which set a policy precedent—are generally elevated for the attention of the EPA Administrator, who, if unable to persuade OMB, must either choose those issues which he will appeal to the President, accept OMB's views, or publish the regulation without OMB approval. There is no public record of the latter step having been taken.

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*See table A.

[27] Executive Order 12291, Annual Report for 1984, published in Appendix III, *Regulatory Program of the United States Government*, August 1985.

[28] House Judiciary Subcommittee Hearings on the Regulatory Reform Act, p. 1560.

TABLE A.—NON/MAJOR/MAJOR EPA RULES REVIEWED UNDER EXECUTIVE ORDER 12291

	Total	Nonmajor		Major	
		NPRM	Final	NPRM	Final
1981	734	270	462	1	1
1982	340	152	182	1	5
1983	268	154	182	1	1
1984	302	166	129	7	0
Total	1,644	742	885	10	7

Source: OMB Annual Reports on Executive Order 12291.

TABLE B.—DISPOSITION OF EPA RULES REVIEWED UNDER EXECUTIVE ORDER 12291

	Total	Consistent [1] without change		Consistent with minor change		Returned for reconsideration		Withdrawn		Exempt		Returned sent improperly		Emergency, statutory or judicial deadline	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
1981 [2]	734	658	89.6	11	1.5	20	2.7	13	1.8	28		3		1	
1982 [3]	340	262	77	48	14.1	11	3.2	9	2.6	0		8		2	
1983	268	220	82	40	14.9	3	1.1	2	0.7	0		1		2	
1984	302	225	74.5	63	20.9	4	1.3	9	3.0					1	
Total	[4] 1644	1,365	83.0	[5] 200	12.2			33	2.0	28	2.1	12	0.9	6	0.4

[1] With Executive Order 12291.
[2] Feb. 17, 1981–Dec. 31, 1981.
[3] Calendar year for 1982–84.
[4] 16.4 percent of the total 10,022 rules reviewed by OMB, 1981–84. EPA's percentage share of rules reviewed declined from 26.2 percent in 1981, to 12.9 percent in 1982, to 10.8 percent in 1983, and increased to 14.4 percent in 1984. The number of rules submitted by EPA for OMB review declined 58.9 percent from 1981 to 1984.
[5] Total of EPA rules from two categories: Consistent with minor changes; Returned for reconsideration.

Note. This chart understates OMB's effect on agency rules because it cannot show the the effect of agency consultations with OMB before proposed rules are submitted for OMB review.

Source: OMB annual reports on Executive Order 12291.

LENGTH OF OMB REVIEW

OMB's contribution to delay of EPA rules has been a major concern expressed by former EPA officials. However, EPA has not overtly used statutory or judicial deadlines to issue rules independently of OMB's review—only 0.4 percent of rules reviewed by OMB from 1981 to 1984 were issued under this exemption,[29] even though approximately 86 percent of the environmental deadlines set by Congress have been missed.[30]

Several significant rules have been held for lengthly OMB review, including National Ambient Air Quality Standards (NAAQS) for NO_2 (5 months), asbestos phasedown (6 months), asbestos ban (approximately 9 months), high level radioactive waste disposal (1 year), New Source Performance Standards (NSPS) for stationary internal combustion engine and beverage can surface coating (1 year past the statutory deadline), and effluent guidelines for iron and steel (1 year).[31]

Two additional EPA cases have received public and congressional attention. In the first, the Environmental Defense Fund (EDF) sued both EPA and OMB for missing the March 1, 1985 statutory deadline for final permitting standards for storage of hazardous waste in underground tanks. Several Members of Congress filed an amicus brief in support of EDF's petition for judicial relief. In the second case, OMB released forty national primary drinking water standards after nearly six months of review and discussion with EPA, and only after Senate passage of an amendment to the Superfund reauthorization requiring completion of OMB review by October 9, 1985. Both cases are discussed in more detail in the section on case studies below.

EPA now compiles data on average number of days rules are extended by OMB (past the 60-day/30-day/10-day "limit"). The average per rule has fluctuated since March 1984 when the biweekly document was first compiled. The average extension in April 1985 was slightly under 50 days; previous peaks were near 100 days. This means that currently OMB holds minor rules for an average of over two months and major rules for over four months. Selected rules which are of policy concern to OMB, such as those mentioned above, may be delayed much longer.

Several former EPA Assistant Administrators have described lengthy battles with OMB over permissible factors for consideration in developing agency rules. One of the central isues has been OMB's advocacy of cost considerations (prohibited by the applicable Clean Air Act section) in development of national ambient air quality standards (NAAQS) under the Clean Air Act. (These issues are described in more detail in the section on case studies.) In addition,

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[29] OMB Annual Report on Executive Order 12291 (for 1983), July 13, 1984, and *Regulatory Program of the United States Government*, April 1, 1985–March 21, 1985, Appendix III: Executive Order 12291, Annual Report for 1984, OMB, August 1985.

[30] "Statutory Deadlines in Environmental Legislation: Necessary but Need Improvement." Report by the Environmental and Energy Study Institute and the Environmental Law Institute, September 1985, p. 11. (Hereafter cited as Statutory Deadlines Report.)

[31] Sources: Erik Olson, "The Quiet Shift of Power: Office of Managment and Budget Surpervision of Environmental Protection Agency Rulemaking Under Executive Order 12291," *Virginia Journal of Natural Resources Law*, Vol. 4, No. 1 (Fall 1984), and EPA internal documents provided to the Senate Committee on Environment and Public Works.

several of those interviewed cited increasingly acrimonious relations between OMB and EPA as an important impediment to agency operations and to basic employee job satisfaction.

Executive Order 12498

SCOPE

George Eads, Dean of the School of Public Affairs at the University of Maryland, stated in a June 1985 National Public Radio interview that Executive Order 12498 "represents a fundamental shift in the way we regulate and the power of the President to control that. [The Order] gives the President effective tools to bring badly needed consistency to regulations, but it also gives him to tools to impose . . . political ideology on the [regulatory] process."

Executive Order 12498,[32] issued January 4, 1985, requires agencies subject to Executive Order 12291 [33] to submit annually a proposed regulatory agenda to OMB. The agenda covers "significant regulatory actions" [34] planned for the coming year, including actions to be reviewed under Executive Order 12291, and prerulemaking actions such as "any important actions taken to consider whether to initiate, or in contemplation of, rulemaking; publication of advanced notices of proposed rulemaking and all similar notices, publications, and requests for public comment; and development or dissemination of draft guidelines, policy proposals, strategy statements, and similar documents that may influence, anticipate, or could lead to the commencement of rulemaking proceedings at a later date." [35] OMB's definition of significant regulatory action is quite broad. The instructions for the format of agency descriptions of these actions contain a further illustration:

> For example, the decision to create an agency task force to evaluate the need for a regulation that, if proposed, would be a "significant regulatory action," or to undertake a study to assess an economic problem related to possible regulatory action that would be "significant," or to analyze health and safety risks concerning a hazard the regulation of which would be "significant," should all be considered as significant prerulemaking activities.[36]

Except in the cases of emergency situations (*to be defined by the Director of OMB*), or statutory or judicial deadlines, the agency is prohibited from taking regulatory action unitl OMB review of the agenda is completed (sec. 3(c)). OMB may also, to the extent permitted by law, and in the absence of emergency, or statutory or judicial deadlines, return for reconsideration any rule submitted under

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[32] 50 *Federal Register* 1036 (1985).

[33] See footnote 17; Department of Justice (subject to exception, OMB Bulletin 85-9, Suppl. 1); Department of Treasury (reportedly subject to secret exemption); "OMB Control of Rulemaking: The End of Public Access," David Plocher, OMB Watch, August 1985, p. 14.

[34] Executive Order 12498, Bulletin 85-9 defines a "significant regulatory action" as a prerulemaking or rulemaking action leading to a rule which is a major rule, an agency priority, subject to a statutory or judicial deadline, of unusual interest to other Fedral agencies or to the public, likely to establish a new policy or legal precedent, or so designated by the Director of OMB (Sec. 5 (c)).

[35] Executive Order 12498, Bulletin No. 85-9, Sec. 5(a).

[36] *Ibid.*, Attachment 1.

Executive Order 12291, which is not included on the agency regulatory agenda (sec. 3(d)). OMB clarified this requirement in a May 29, 1985 memorandum [37] which stated that section 3(d) applies to actions not included in an agency's final regulatory agenda because they were determined to be inconsistent with Administration policy, but does not apply to actions not included because they were not found to be "significant."

The Director of OMB is authorized to consider in his review the cosistency of the agency's regulatory agenda with the Administration's policies and priorities, and with other agencies' agendas (sec. 3(a)(i)). This standard of review may put the order squarely in conflict with statutory authorities set by Congress; such statutory restrictions are not addressed in this section of the order.[38] The Director may also identify further regulatory or *deregulatory* actions in order to achieve such consistency (sec. 3(a)(ii)) and impose their consideration on the agency.

In addition, the order directs the agency head to "ensure that all regulations are consistent with the goals of the agency and of the Administration, and will be appropriately implemented" (sec. 1(b)). There is no explicit requirement that such agency actions be consistent with existing statutes.

When there is disagreement between EPA and OMB over the content of the regulatory agenda, either the agency head or the Director of OMB may raise the issue to the President or to the appropriate Cabinet Council or other forum designated by the President. EPA was a member of the former Cabinet Council on National Resources and the Environment. Since EPA is no longer represented on either the newly reorganized Domestic Policy Council or the Economic Policy Council, while OMB is a member, EPA may be at a disadvantage in the appeal process for those issues which would fall under the purview of either Council.

The broad scope of Executive Order 12498 and the powers it gives to OMB have raised considerable concern on the part of former and current EPA employees. Termed by some the "thought control" order, it is viewed as likely to reduce EPA's ability to collect the information it needs to adequately defend its regulatory proposals submitted to OMB, while OMB will still have access to industry analysis opposing the rule. In addition, the order extends OMB's influence further into the agencies, consolidating OMB ability to restrict the regulatory planning activities of EPA and other agencies. When OMB's current director, James Miller, was Administrator of the Office of Information and Regulatory Affairs in 1981, he viewed Executive Order 12291 as a tool: "Among the people whose behavior we're trying to influence are the GS 13s and 14s who draft the rules." [39] One must assume that the same goal is among those envisioned for Executive Order 12498.

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[37] "Actions not Included in the Final Regulatory Program Under Executive Order No. 12498," Memorandum to the Heads of Certain Executive Departments and Agencies from Douglas H. Ginsberg, Administrator, Office of Information and Regulatory Affairs, OMB, May 29, 1985. Document on file.

[38] Section 4 of the Order authorizes the Director of OMB, "to the extent permitted by law, to take such actions as may be necessary to carry out the provisions of this Order."

[39] *Regulation* (1981), p. 22.

OMB's Bulletin No. 85-9 ascribes to the functions of the draft regulatory program the goals of ensuring earlier involvement of agency heads in the rulemaking process, timely completion of significant regulatory actions, targeting of agency resources and OMB reviews under Executive Order 12291 towards "matters of greatest importance to the Administration," and ensuring that, "to the extent permitted by law, agency resources will not be expended on regulatory actions . . . not consistent with the regulatory goals of the agency head and of the President" (sec. 7). Under the Executive order the EPA Administrator's ability to take internal actions, such as the establishment of a task force to study the need for regulation, may be severely constrained for those areas where he has only discretionary authority, or where he has several choices as to how to carry out a statutory mandate. As several observers have pointed out, the ultimate and undesirable effect, from both OMB's and EPA's points of view, may be increasingly specific congressional mandates and less flexibility for EPA to carry out its mission to protect public health and the environment.

CURRENT STATUS OF EXECUTIVE ORDER 12498 REVIEW PROCESS

In early May 1985, OMB issued a new set of guidelines for agency development of final regulatory agendas. The guidelines required agencies to submit a detailed justification (in a simpler format) of the proposed "significant regulatory action," including a description of the underlying problem and why regulation is the proper response, whether private parties, or State, local, or Federal Government could take action, and alternative approaches. The guidelines directed that "every agency regulatory activity should support and further the policy goals and priorities of the Administration, consistent with all applicable legal requirements." [40]

After preliminary informal discussions with OMB, EPA submitted a list of prerulemaking and rulemaking actions for OMB review. The final regulatory agenda was published in August 1985. Before the agenda was published, the Department of Agriculture was reported to be negotiating with OMB for exemption of a large portion of its rules from Executive Order 12498 [41] on the grounds that its rules were too technically complex for OMB staff, who generally do not make substantive changes but cause considerable delay of USDA rules. The Treasury Department was also reported to have negotiated a similar agreement.

The regulatory program established by Executive Order 12498 deserves further analysis which is beyond the scope of this paper. The process of developing the program has the potential to place OMB in a position to significantly affect agencies' ability to take actions to assess environmental and health risks and the need for regulation. Future analysis should compare agencies' internally developed lists of prerulemaking and rulemaking activities with initial drafts submitted to OMB and with the Administration's published regulatory program. Central questions will be whether significantly fewer actions appear in the final program, whether

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[40] Executive Order 12498, Bulletin No. 85-9, Supplement No. 1, Attachment B, Sec. 5.

[41] "USDA May Seek Agreement with OMB to Exempt Some AG Rules Under Executive Order 12498", *Inside the Administration*, May 16, 1985, p. 6.

agency-planned approaches to those actions seem to be significantly changed in content or in emphasis, and whether any regulatory or deregulatory actions have been added.

Current Sunshine Provisions and Implementation

Agency rulemakings are governed by procedures established by law and the courts which are intended to provide opportunity for meaningful public participation and effective judicial review. OMB practices in implementing Executive Order 12291 have raised concerns that the openness of the rulemaking process is being compromised, that regulatory decisions are influenced by off-the-record contacts and the reasons for those decisions are not fully stated in or based on the public record. The new Executive Order 12498 is viewed by some as providing an earlier opportunity for off-the-record influence of agency rulemaking and prerulemaking decisions. This section provides an overview of current procedures and particular issues of concern.

ADMINISTRATIVE PROCEDURE ACT

The informal rulemaking process (as opposed to formal adjudicatory hearings) generally used by EPA to develop and promulgate rules is subject to three basic requirements in section 553 of the Administrative Procedure Act (APA):

1. Publication of a general notice of proposed rulemaking in the *Federal Register;*
2. Opportunity for interested parties to participate in the rulemaking through submission of written and sometimes oral comments; and
3. Incorporation in the final rule of a summary by the agency of its basis and purpose.

The APA (sec. 706(2)(a)) and most of EPA's substantive statutes also authorize judicial review of agency decisions and require the reviewing court to set aside agency decisions it finds to be arbitrary and capricious.

RECORD KEEPING REQUIREMENTS

The APA does not specify the type of rulemaking record an agency must keep. (The Clean Air Act, however, does have specific rulemaking record requirements.) Reviewing courts have necessarily addressed the question of an adequate rulemaking record in judging whether an agency rule is arbitrary and capricious. In 1978, the Supreme Court in *Vermont Yankee Nuclear Power Corp.* v. *NRDC* cautioned lower courts against imposing additional procedural requirements not specified in the APA section on informal rulemaking. However, there has been continuing judicial concern that the rulemaking record be complete and adequate to ensure public access to the rulemaking process, to facilitate informed decisionmaking, and to provide a foundation for judicial review.[42]

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[42] Olson, p. 28. Most recently confirmed by the Supreme Court in *Motor Vehicle Manufacturers Association of the U.S.* v. *State Farm Mutual Automobile Insurance Co.* (No. 82-354, June 24, 1983.)

One of the critical issues for public access to the agency rulemaking process is the timing of the agency's decision to establish a public docket. General practice at EPA has been to open a docket when a proposed rule is published in the *Federal Register.*[43] A public docket opened upon publication of a proposed rule is, at least in theory, able to capture information relevant to the rules reviewed by OMB under Executive Order 12291. However, as part of the executive branch and under its Executive Order 12291 and 12498 authorities, OMB has the ability to provide comments and influence agency rulemaking and prerulemaking decisions both before the action is proposed for public comment and after the close of the comment period. There is no effective mechanism to provide to the public or to Congress, when OMB input persuades an agency not to act or to significantly change a final rule, information on the substance of OMB comments, when they were submitted, and whether their source was internal OMB analysis or argument provided to OMB by external parties. In particular, the critical decisions of the regulatory planning process set up by Executive Order 12498 occur entirely outside the scope of the Administrative Procedure Act and current agency public docketing practices.

EX PARTE COMMUNICATIONS

Ex parte communications are unannounced, off-the-record contacts between decisionmakers and some interested parties in a rulemaking. Rosenberg has pointed out that "Executive Order 12291 commands the early intervention of the President's closest aides and advisors in the agency rulemaking process. In so doing, the order greatly increases the opportunities for off-the-record *ex parte* contacts between executive agencies engaged in rulemaking and the While House." [44] It is importnt to note that the key day-to-day actors in the Executive Order 12291 review process are generally *not* "the President's closest aides and advisors" but the staff and first line supervisors of the Office of Information and Regulatory Affairs (OIRA). Neither these individuals nor the Administrator or Deputy Administrator of OIRA are political appointees confirmed by the Senate; thus they are not accountable to Congress or to the public for the recommendations which they make to agencies. Others have pointed out that *ex parte* contacts, in particular those between OMB and industry, "if undocketed, * * * impede public participation, reasoned and accountable decisionmaking, and meaningful judicial review." [45]

Ex parte contacts between decisionmakers and parties outside the agency are not statutorily prohibited for informal rulemaking and courts have been reluctant to prohibit them or to require dock-

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[43] One recent exception: EPA Administrator W.D. Ruckelshaus informed House Energy and Commerce Chairman John Dingell that EPA intended to open a public docket on the asbestos ban and phasedown before the proposed rules were published (letter dated August 7, 1984).

[44] Rosenberg, Michigan Law Review 1981, p. 234.

[45] Olson, p. 31; Kenneth Culp Davis, "Presidential Control of Rulemaking," *Tulane Law Review,* Vol. 56, No. 3 (April 1982), noting that OMB secrecy about the facts and influences it considers impairs accountability; pp. 854-856; Alan Morrison, "Presidential Intervention in Informal Rulemaking: Striking the Proper Balance," *Tulane Law Review,* Vol. 56, No. 3 (April 1982), p. 893.

eting except in cases where "competing claims for a valuable privilege" [46] (such as a license) can be established. Courts generally have treated docketing of *ex parte* contacts by the decisionmaking agency as sufficient to avoid reversal of a rule, if done in time for other interested parties to comment.[47] Courts have not addressed the issue of whether docketing of OMB contacts with external parties is required.[48]

INTRAGOVERNMENTAL COMMUNICATIONS

Concerns about communications between OMB and EPA during the rulemaking process have focused on two areas:

1. The degree to which undocketed OMB oral or written contract with EPA has influenced the final rule; and
2. OMB's role as a conduit for industry critique of a proposed rule.

OMB typically conveys its comments on a rule to EPA orally through meetings and telephone calls. No court has ruled on whether the Administrative Procedure Act requires that oral or written communications from OMB to an agency must be entered in the rulemaking docket.[49] OMB views predecisional materials in the regulatory review process as subject to Executive privilege and also as exempt from public disclosure under section 552(b)(5) of the Freedom of Information Act (FOIA).[50] EPA's internal policy on preparing written summaries of OMB oral communications has recently been revised (see below) but the agency in general has not docketed such summaries and, like OMB, would view them as exempt from disclosure under FOIA.[51] For development of the regulatory planning agenda under Executive Order 12498, there is currently no public docket policy, as noted above.

A report recently issued by the House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations states the central concern with OMB implementation of the Executive orders: "Congress' intention to provide for meaningful public participation in, and effective judicial review of, EPA rulemaking has been nullified by OMB's secret, off-the-record communications with the agency and private parties." [52]

OMB's stated policy is to send industry-generated written *factual* material (as opposed to material containing argument) on a proposed rule to EPA for inclusion in the docket and to include such documents in the public reading file at OMB.[53] Concerns have been raised that critiques developed by industry are put forth as OMB's own (see below: asbestos, effluent guidelines for iron and steel, and new source performance standards case studies) and that

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[46] Olson, p. 29, note 129. See also *Sierra Club* v. *Costle*, 657 F. 2nd 298 (1981).
[47] *Ibid.*, p. 30, note 138.
[48] *Ibid.*, p. 36.
[49] *Ibid.*, pp. 37–38.
[50] Conversation with OMB official "A", May 1985.
[51] Conversation with EPA OGC staff member, April 1985.
[52] "EPA Asbestos Regulations, Report on a Case Study on OMB Interference in Agency Rulemaking," Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, U.S. House of Representatives, Committee Print 99–V (October 1985), p. 100. (Hereafter cited as Asbestos Report.)
[53] Memorandum for Heads of Executive Departments and Agencies from OMB Director David Stockman, June 11, 1981; Memorandum for OIRA staff from OIRA Deputy Administrator Robert Bedell, "OIRA Procedures #3," May 1985.

the OMB public reading file is not effectively maintained.[54] There is no OMB policy for keeping a calendar or any other record of meetings or telephone calls with interested external parties (apparently primarily industry representatives) or for summarizing such meetings in writing. However, in a May 30, 1985 letter to EPA Deputy Administrator James Barnes, OIRA Deputy Administrator Robert Bedell proposed a trial policy under which OIRA would provide EPA (through a phone call to the EPA General Counsel) any *factual* information not already in the public record which the OIRA Administrator or Deputy Administrator receive orally from a person outside the executive branch (emphasis added).[55] In addition, for a limited period of time and for selected rulemakings OIRA will invite senior EPA officials to attend scheduled meetings with persons outside the executive branch. Although this proposed policy may signal increased OMB attention to external criticism of their regulatory role, a policy limited to disclosure of *factual* information will be meaningless since it is the interpretation of those facts which is so often in dispute. Moreover, excluding policy and legal interpretations from public view obscures the power of OMB to exert influence in this area. Further, when such interpretations of data are those of a private party and are anonymously transmitted through OMB, the influence of the private party is increased by the OMB official's signature which brings with it the apparent imprimatur of the President.[56]

COMPARISON OF INTERNAL AGENCY POLICIES ON PUBLIC ACCESS TO THE REGULATORY DECISIONMAKING PROCESS

Environmental Protection Agency

EPA uses guidelines for agency/external party contact set forth by agency Administrator William Ruckelshaus in the "fishbowl" memo issued in May 1983, and revised in May 1985 by Administrator Lee Thomas. The Ruckelshaus policy required that "any oral communication regarding significant new factual information or argument affecting a rule including a meeting with an interest group, should be summarized in writing and placed in the rulemaking docket for the information of all members of the public." [57] Acting EPA Deputy Administrator James Barnes, in a written response to a question from Senator Robert Stafford during Barnes' confirmation hearing, stated that "this existing policy applies to all external communications" [which provide "factual information *or argument* relevant to the substance of the rulemaking that is not already in the public docket"] "*including . . . OMB.*" [Emphasis added.] [58] However, staff in the General Counsel's office, the Office of Air and Radiation, and the Office of Policy, Planning and Evaluation, report that the Ruckelshaus "fishbowl" memo has *not* been

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[54] Olson, p. 65, note 324.

[55] Letter from Robert P. Bedell, Deputy Administrator, Office of Information and Regulatory Affairs, OMB, to A. James Barnes, Deputy Administrator, EPA, with attachments, May 30, 1985. Document on file.

[56] Asbestos Report, pp. 102-103.

[57] Memorandum to EPA employees from W.D. Ruckelshaus, on "contracts with persons outside the agency," May 19, 1983. (Ruckelshaus memo and Thomas revision on file.)

[58] Response from James Barnes, Acting Deputy Administrator, EPA, to Senate Environment and Public Works Committee confirmation hearing questions, April 30, 1985.

interpreted to apply to OMB. Further, the memo may not apply to pre-proposal oral communications and thus is not likely to cover the Executive Order 12498 regulatory agenda process.

The Thomas memo closely tracks the Ruckelshaus May 1983 memo, with one significant change in the section on "Rulemaking Proceedings." The Thomas memo requires that a written summary of oral communications involving "significant new factual *data* or information likely to affect the final decision" on a rule be placed in the public record (new language shown in italic). The new wording removes "argument" from the docketing requirement, requires that the final decision be supported by the record ("as far as practicable") and deletes the requirement that decisions not be taken "on the basis of information or arguments which have not been disclosed to members of the public in a timely manner," replacing that with a requirement that final decisions be "supported by the public record and the Agency's rationale [be] fully explained in the preamble to the final rule."

Excising the "argument" phrases allows EPA to apply the Thomas memo to OMB since policy arguments would no longer be covered, and OMB has no objection to factual information being placed in the public docket. However, for an agency such as EPA which makes its regulatory decisions based on data and risk assessments which are subject to varying arguments having substantial impact on the final rule, the deletion of information on those arguments from the public record significantly weakens the commitment of the agency to operate "in a fishbowl." EPA claims that adding the phrase requiring that final decisions be "supported by the public record and the Agency's rationale [be] fully explained in the preamble to the final rule" will ensure that changes suggested by OMB are included (without reference to source) in the preamble.[59] As noted above, GAO found that this practice was rare in 1982; it is not clear that any incentives have been created to increase it. In addition, this protection will not apply to rules which are withdrawn by EPA in response to OMB opposition. The OMB would likely take the position that any written documentation of OMB views be subject to Executive privilege and exempt from public dislosure as predecisional material under the Freedom of Information Act (sec. 552(b)(5)). One result of the policy set forth in the Thomas memo is that a reviewing court will have no way of knowing whether EPA's decision to modify or delete portions of a rule was an agency decision or an OMB decision.

In addition, it is unclear whether the "fishbowl" memo applies to the preproposal phase where the development of the regulatory agenda under Executive Order 12498 occurs. The decisionmaking process under Executive Order 12498 appears to remain completely closed to the public.

The Ruckelshaus and Thomas "fishbowl" memos also require the Deputy Administrator, all Assistant and Associate Administrators, Regional Administrators and staff Office Directors to make their appointment calendars available to the public through the Office of

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[59] Meeting between Francis Blake, EPA General Counsel nominee, and Gerald Yamada, Acting EPA General Counsel, and staff of Senate Environment and Public Works Committee, June 14, 1985.

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Public Affairs, following the Administrator's example. The calendars do include intragovernmental meetings.

Food and Drug Administration

The FDA is the only regulatory agency which has issued its own regulations on record keeping requirements. The regulations, issued in 1975,[60] requires that substantive meetings and phone calls with *all* external parties, including OMB and other executive branch agencies, industry, and congressional members or staff be summarized and placed in an administrative file. In practice, these memos may or may not be included in the docket. This policy also covers preproposal meetings.

FDA also publishes a weekly public calendar [61] listing meetings, topics, and participating groups. The calendar notes those meetings for which summaries are available. However, the calendar does not generally list intragovernmental meetings; meetings between FDA and OMB are not listed.

Occupational Safety and Health Administration

OSHA's policy on *ex parte* oral contacts during the informal and hybrid rulemaking process emanates from an April 13, 1982 memo for executive staff from the solicitor of the Department of Labor.[62] The memo recommends that *ex parte* written comments containing factual information relevant to the rule should be placed in the rulemaking file. Similarly, oral comments containing such factual information should be reduced to writing and placed in the file. OMB oral or written comments whether factual or argumentative would apparently not be covered.

The solicitor's memo is the only OSHA document implementing this policy. As might be expected, implementation appears to be uneven.

While EPA and FDA both have relatively open policies regarding public access to information during the regulatory decisionmaking process, implementation of these policies has been uneven, and, in the case of EPA, the policy does not apply to EPA/OMB communications. Further, agency policies have not been developed to address public access to the development of the regulatory agenda under Executive Order 12498.

OMB Staff Expertise

The focal point of the regulatory review process at OMB is the office of Information and Regulatory Affairs (OIRA), headed by Wendy Gramm, with Robert Bedell as Deputy Administrator. Within OIRA there are four desk officers (in the Regulatory Policy Branch) responsible for reviewing EPA rules under Executive Orders 12291 and 12498, and information requests under the Paperwork Reduction Act, in the areas of toxics, air, water, and hazardous waste. They are assisted by two analysts in the Regulatory Analysis Branch, by EPA budget examiners from the Environment Branch of the Natural Resources, Energy, and Science Division,

[60] 21 C.F.R. 10.65.
[61] 21 C.F.R. 10.100.
[62] Document on file.

and on occasion by OMB's Office of General Counsel (see organization chart following this section).

Two of the concerns raised by EPA, congressional staff, and interest groups are extensive OMB delay of EPA rules and lack of staff scientific and technical expertise. In part, OMB's delay of rules is due to time required for OMB/EPA discussion of policy concerns. However, even without policy-related delays the large volume of EPA rules reviewed under Executive Order 12291 in 1981 to 1983 would have made delay likely. Although the number of EPA rules reviewed has been declining, the four desk officers responsible for review of EPA rules acted on 302 rules in 1984, an average of over one per working day. In 1981, the first year of review under Executive Order 12291, 734 EPA rules were reviewed by OMB, an average of three rules per working day. Since review of prerulemaking actions under Executive Order 12498 has now been added to a workload which already included reviews under the Paperwork Reduction Act as well as Executive Order 12291 reviews, OMB's lengthly procedural and policy delays of EPA rules are likely to continue. Similar problems exist for other regulatory agencies subject to the Executive orders.

It should be noted that among the activities listed above, the only one for which OIRA has specific statutory authority is review of information collection requests under the Paperwork Reduction Act.

The OIRA staff who review EPA rules may not have the scientific or technical expertise necessary to evaluate conflicting interpretations of factual data presented by the agency and by interested industry representatives.[63] At the same time, the weight carried by OMB's views may reduce the role of agency scientific and technical skills.[64] OIRA staff graduate degrees are in public policy, business administration, and economics. In contrast, the staff who develop EPA regulations tend to have training in engineering, chemistry, toxicology, law, and public policy. Thus the four EPA desk officers in OIRA must review all proposed and final rules, in addition to the regulatory program established by Executive Order 12498, of an agency with a staff of about 10,000, most of whom are experts in their fields.

The lack of scientific and technical training may make new desk officers more vulnerable to the OMB deregulatory bias. One former EPA desk officer at OMB reported, "I didn't have the technical expertise to work on EPA issues. I would receive studies on both sides of [a toxic substance] issue and I just didn't know [how to evaluate the conflicting arguments]. I knew I would do well from my boss' perspective if I got rid of rules on [the toxic substance]. * * * A good desk officer does change a rule. To make your mark, you get changes made. I felt kind of funny handing [my supervisor] back a rule saying it was consistent [with Executive Order 12291]. * * * It

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[63] This concern has been raised by Olson (p. 14); Paul R. Verkuil, "Symposium on Presidential Control of Rulemaking: An Introduction," *Tulane Law Review*, Vol. 56, No. 3 (April 1982); Alan Morrison, "President Intervention in Informal Rulemaking: Striking the Proper Balance," *Tulane Law Review*, Vol. 56, No. 3, p. 893.

[64] Davis, *Tulane Law Review*, Vol. 56, No. 3 (April 1982), p. 852.

would have been very difficult to advocate EPA's position. OMB has squashed some regulations I would have agreed with." [65]

In addition, several critics have expressed concern that the number of political appointees at OMB and other agencies has increased under the Reagan administration and that OMB in particular has become increasingly politicized since the 1960's.[66]

Comparing the number of Schedule C political appointees in 1984 to the number near the end of the Carter administration reveals an increase in political positions at EPA and OMB:

SCHEDULE C POLITICAL APPOINTEES: CARTER (1980) V. REAGAN (1984)

	1980	1984	Percent change
OMB	9	25	+177
EPA	20	27	+35

Sources: 1980: Policy and Supporting Positions (House Post Office and Civil Service Committee, November 8, 1980), current up to August 30, 1980. 1984: Policy and Supporting Positions (Senate Committee on Governmental Affairs, December 31, 1984), current up to September 30, 1984.

One critic states that OMB staffing, as compared to the old Bureau of the Budget, "is partisan and the organization is transitory, not institutional. * * * It lacks technical expertise * * * but * * * is expert in terms of political dimensions of regulatory reform and the Reagan agenda." [67]

[65] Conversion with an anonymous former desk officer, May 1985.

[66] "The Reagan Presidency: Limited Government and Political Administration," *Public Administration Review*, January/February 1983, states that OMB staffing has become increasingly political since President Nixon's addition of political appointees (Program Associate Directors—"PADs") at levels below the Director, and regulatory reform has "elevated political pressures from the agencies to OMB" (p. 12). Similar concerns are raised by Margaret Jane Wyszomirski, "The De-Institutionalization of Presidential Staff Agencies," *Public Administration Review*, September/October 1982.

[67] Chester A. Newland, "Executive Office Policy Apparatus: Enforcing the Reagan Agenda," in *The Reagan Presidency and the Governing of America*, Lester M. Salamon and Michael S. Lund, eds., Washington Urban Institute Press, 1984, p. 163.

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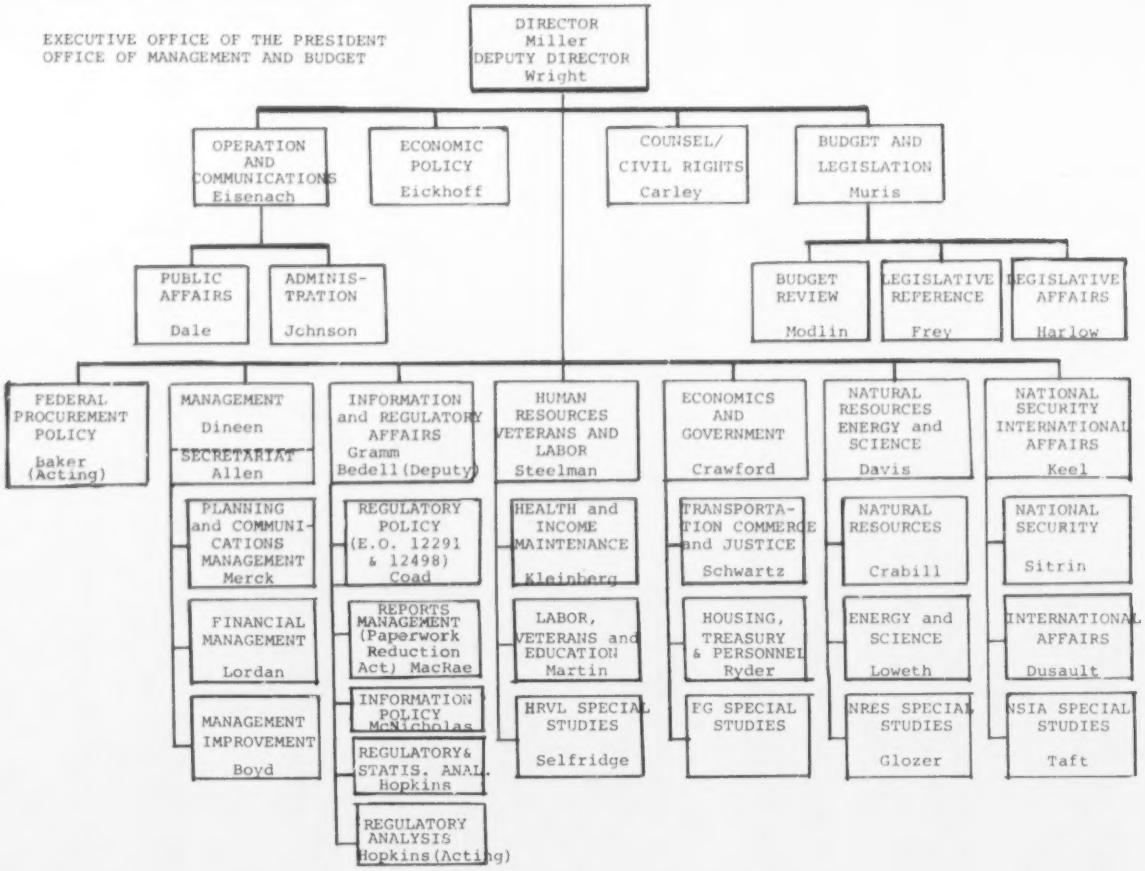

Selected Case Studies: Inappropriate OMB Intervention in Agency Rulemaking

The concerns raised by observers of OMB's implementation of Executive Order 12291 are illustrated by OMB's reviews of several specific EPA rules. A House Energy and Commerce Oversight Subcommittee August 1984 report summarized the issues raised:

> In these cases, one can find evidence of OMB transmission of industry views and information without identification; substitution of political considerations for the economic analysis required by Executive Order 12291; oral rather than written directives from OMB to EPA; failure to record OMB input in the public docket of EPA rulemaking, even when the statute requires it; secret meetings between OMB and affected industry representatives; unrecorded meetings between OMB and EPA; arbitrary delays in the OMB review process, some of which force violation of statutorily prescribed or court-ordered deadlines; or the modification or complete displacement of technical, scientific, or policy judgements of EPA officials as a result of OMB pressure. [68]

The Subcommittee report cites the following specific rules as documented examples of OMB intervention in the EPA rulemaking process: [69]

—high level radioactive waste disposal;
—new source performance standards (NSPS);
—national ambient air quality standards (NAAQS) for particulate matter;
—lead phasedown regulation for lead in gasoline;
—effluent guidelines for the iron and steel industry;
—the dredge and fill permit program under the Clean Water Act; and
—effluent guidelines for battery manufacturers.

Confirmation or refutation of such OMB interference is difficult to develop since OMB's internal policy is not to put its comments to the agency in writing. Some of the examples which follow are well-documented because the rule has been the subject of a lawsuit or a congressional oversight hearing; in other cases, there has been testimony on the record at an oversight hearing. Appendix A of this report contains a summary of selected rules held at OMB which were highlighted for EPA Administrator Lee Thomas in May or June 1985.

ENVIRONMENTAL PROTECTION AGENCY

Asbestos

An April 16, 1985 oversight hearing conducted by the House Energy and Commerce Subcommittee on Oversight and Investiga-

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[68] *Report on the President's Claim of Executive Privilege over EPA Documents, Abuses in the Superfund Program and other Matters, Subcommittee on Oversight and Investigations,* House Energy and Commerce Committee, August 1984, Committee Print 98-AA, p. 293 (Hereafter cited as Superfund Report.)

[69] *Ibid.*, pp. 292-293.

tions [70] brought out evidence of OMB displacement of Agency rulemaking authority, and raised again the issues of delay, secrecy, and OMB's role as a conduit for industry critiques of a proposed rule.

The Committee found that OMB's involvement under the authority of Executive Order 12291 in EPA's decisionmaking process on two proposed asbestos rules delayed agency action for over a year.[71] The Committee report stated further that "OMB displaced the discretion vested by Congress in the EPA Administrator under section 9 of TSCA, subverted meaningful public participation in the regulatory process, and precluded effective judicial review of the Agency's action," and that "the Agency capitulated to pressure from OMB leading to the arbitrary abandonment of a fully considered regulatory strategy to protect the public against asbestos risks." [72]

The minority report submitted by the subcommittee's five Republican members did not disagree with the basic facts brought out by the investigation, but did disagree strongly with the conclusions, asserting the belief that "Executive Order [12291] and OMB's implementation of it, in general, comport with constitutional and judicial principles." [73] The minority subcommittee members, however, did recommend that the issue of the uses of cost/benefit analysis be "fully and openly" [74] debated by EPA, OMB, and other agencies in a public process.

This case, like the ethylene oxide case (OSHA) described below, involves a sudden reversal of an agency rulemaking decision, apparently unsupported by agency analysis. In 1979, EPA began a regulatory strategy under the Toxic Substances Control Act (TSCA) to reduce the human health risks of asbestos through a ban on certain asbestos product categories and a phasedown of production for remaining uses of asbestos fiber.The proposed ban and phasedown rules were sent to OMB for review under Executive Order 12291 in May and August respectively, 1984. Until December 1984, discussions with OMB staff focussed primarily on cost-effectiveness and on economic discounting of the rules' health benefits.

On December 21, 1984, EPA's then General Counsel James Barnes was informed by Administrator designate Lee Thomas of his intention to request White House approval of Barnes as Acting Deputy Administrator. On December 27, at a meeting between OIRA Deputy Administrator Robert Bedell and Barnes, OMB raised for the first time their recommendation for referral of asbestos risks to the Occupational Health and Safety Administration (OSHA) and the Consumer Product Safety Commission (CPSC). The OMB opinion was set out in a legal memorandum contained in an internal OMB asbestos briefing book given to Barnes at the meeting.

On January 31, 1985, EPA withdrew the proposed asbestos ban and phasedown rules from OMB review and on February 1 an-

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[70] *EPA's Asbestos Regulations: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce*, 99th Congress, 1st Session (1985), Serial No. 99-2.

[71] Asbestos Report, p. 6.

[72] *Ibid.*, pp. 7-8.

[73] *Ibid.*, Minority Report, p. 6.

[74] *Ibid.*, *p. 8.*

nounced a decision to refer the regulatory decision to OSHA and CPSC, under section 9 of the Toxic Substances Control Act (TSCA). EPA's decision, made independently by Acting Deputy Administrator James Barnes, was not supported by any internal agency documents (except for a legal memorandum written January 30, 1985, after the internal EPA decision to refer was made but before the formal announcement); in fact, an earlier EPA General Counsel's Office memo held that referral was not *required* under section 9, as did an internal interim EPA policy document issued by former deputy Administrator Alvin Alm in August 1984. (For a detailed chronology, see Appendix B).

The only document supporting EPA's decision to refer was the OMB legal memorandum given to Barnes at the December 27 meeting. After the decision, a March 22, 1985 letter from OIRA Deputy Administrator Bedell to Barnes, reiterated strongly the OMB position in favor of referral, consideration of only the residual risk remaining after OSHA regulatory action, and consideration of the environmental and public health effects of asbestos substitutes. The letter closely tracks arguments made in March 1984 by the Asbestos Information Association in a letter to OMB (see Table C).

TABLE C

CRITIQUE OF EPA PROPOSED ASBESTOS RULES

INDUSTRY[1]	OMB[2]
1. Congressional intent in TSCA was to preclude the Administrator of EPA from taking action to regulate a risk if another agency initiates adequate action under its statutory authority.	1. EPA must refer if another agency has, or may have, adequate statutory authority to act to protect against risks associated with a toxic substance. If EPA has doubts, it must submit a report to the other agency and allow them to determine the scope of their legal authority.
2. EPA should consider only the residual risks remaining after exercise of OSHA's broad authority to eliminate "significant" occupational risks through the imposition of all "feasible" workplace controls.	2. OMB asked EPA to revise its benefits estimates (of the ban proposals) to take into account OSHA's proposed standard for asbestos in the workplace.
3. In determining whether these residual occupational risks pose an "unreasonable risk," EPA would be required to compare, in any product ban proceeding, the risks to "the environment and public health" posed by asbestos substitutes.	3. EPA also failed to include in its analysis the possible risk associated with substitutes.

1. Asbestos Information Association/North America (AIA/NA), letter to John Moore, AA, OPTS, and James Barnes, General Counsel; March 22, 1984 (copy of letter sent to OIRA/OMB). Document on file.
2. Robert P. Bedell, Deputy Administrator, Office of Information and Regulatory Affairs, OMB, letter to James Barnes, Acting Deputy Administrator, EPA, March 27, 1985. Document on file.

Drinking water standards

After a lengthy delay caused in part by more than five months of OMB review, EPA published recommended maximum contaminant levels (RMCLs) for approximately forty organic and inorganic chemicals under the authority of the Safe Drinking Water Act (SDWA).[75] Several letters[76] from Senators Stafford, Bentsen, Durenberger, and Baucus of the Environment and Public Works Committee expressed concern that OMB's protracted review of the standards was limiting EPA's ability to fulfill its statutory mandate to issue drinking water standards to protect the public from the hundreds of contaminants which have been detected in public and private water systems. An August 1, 1985 letter to Joseph R. Wright, the Acting Director of OMB, noted that: "Widespread concern about the Agency's historical inability to issue standards and indications of OMB resistance to the establishment of standards served as the impetus for the passage of schedules and deadlines in the Senate bill [S. 124, to reauthorize the Safe Drinking Water Act.]" A September 10, 1985 letter to EPA Administrator Lee Thomas referred to the EPA Administrator's stated independence from the Office of Management and Budget and urged "that [Thomas] unilaterally propose the RMCLs if no action has been taken at the Office of Management and Budget by close of business September 13, 1985."

Finally, on September 19, 1985, over four months after EPA sent the RMCLs to OMB for review, Senator Durenberger introduced on the Senate floor and amendment[77] to the Comprehensive Environmental Response, Compensation and Liability Act (Superfund) requiring OMB to complete their review of the RMCLs and to make them available for publication in the *Federal Register* no later than October 9, 1985. In introducing his amendment, Mr. Durenberger noted the importance of drinking water standards in providing a much-needed and more objective standard for the clean up of Superfund sites as well as for the protection of the nation's drinking water supply.

The RMCLs were released by OMB in late September 1985, shortly after Senator Durenberger's amendment passed the Senate. However, it is clear that the Congress cannot always invest the time and attention that it did for the drinking water standards for every rule which is subject to lengthy OMB review.

Storage of hazardous waste in tanks

On May 30, 1985, the Environmental Defense Fund (EDF) filed suite against EPA for missing the statutory deadline of March 1, 1985 for issuing regulations for the storage of hazardous waste in tanks. Under the Hazardous and Solid Waste Amendments of 1984 (1984 Amendments)[78] EDF also sued OMB on the grounds that OMB review of the proposed tank rule conflicted with the deadline imposed by the 1984 Amendments and was therefore not within the scope of OMB's authority under Executive Order 12291 (sec.

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[75] 50 *Federal Register* 46936, November 13, 1985.
[76] On file.
[77] *Congressional Record*, U.S. Senate, September 19, 1985, pp. 511784-511786.
[78] Public Law 98-616, November 8, 1984.

8(a)(2)), which exempts rules subject to statutory or court-ordered deadlines.

The EDF suit requested declaratory and injunctive relief directing EPA to immediately propose the regulations and to publish final regulations within 270 days of proposal, and prohibiting EPA from submitting any other proposed or final regulation subject to a deadline set by the 1984 Amendments to OMB for review "if such review will impede EPA's ability to satisfy the congressional mandate." [79] EDF also requested the Court to direct OMB to refrain from such review.

The Government's response to the suit conceded that EPA had missed the deadline and requested the Court to determine the reasonableness of EPA's proposed schedule, which would result in a final regulation by June 30, 1986. However, the brief strongly supported EPA's right to consult with OMB and disputed the charge that OMB review would delay the rule, since OMB review would be conducted concurrently with internal EPA review and would not therefore lengthen EPA's schedule for promulgation. The brief also asserted that "An agency head is legally free to ignore the Executive order's directive and exercise his discretion to promulgate a regulation without subjecting it to OMB review," and went on to state: "It must be further emphasized that OMB has no authority under the order to require an agency to conform to its views. The President has directed agencies only to respond to OMB's views, not to conform to them." [80]

James C. Miller, at his confirmation hearing before the Senate Governmental Affairs Committee offered a more practical view in response to a restatement of the Government's argument that agencies are free to ignore OMB's regulatory advice. "They do so with peril," said Miller.[81]

National Priorities List [82]

In developing its update of the National Priorities List (NPL) of high priority sites to be cleaned up under the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), EPA excluded the Silver Creek mining waste site in Utah from the proposed rule, apparently primarily motivated by issues raised by an OMB budget examiner six days before Administrator Thomas signed the package on March 28, 1985.

Although the Silver Creek site received a score on the Hazard Ranking System evaluation adequate for it to be listed, OMB argued that releases at the site would be covered under the Surface Mining Control and Reclamation Act administered by the Department of Interior. Although the site was in fact listed in the pro-

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[79] Plaintiff's brief, *Environmental Defense Fund* v. *Lee M. Thomas and EPA and David Stockman and OMB*. (U.S. District Court for the District of Columbia, Civil Action No. 85-1747), p. 11.

[80] Defendant's Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgement and for Stay of Discovery (U.S. District Court for the District of Columbia, Civil Action No. 85-1747), filed August 12, 1985, p. 9.

[81] Ian Gilbert, "The Deregulator Returns," *Public Citizen*, December 1985, p. 5.

[82] Letter from Jack W. McGraw, Acting Assistant Administrator for Solid Waste and Emergency Response, Environmental Protection Agency, to Chairman John D. Dingell, April 26, 1985. Memorandum from William N. Hedeman, Jr., Director, Office of Emergency and Remedial Response, Environmental Protection Agency, to Jack W. McGraw, entitled "Completion of Red Border and OMB Review of Proposed NPL Update 3," March 28, 1985. (Both documents on file.) Also cited in Asbestos Report, p. 109.

posed NPL update as a result of the internal EPA review process, the Agency decided at the last minute to remove the site in response to OMB concerns and to refer it to the Department of Interior to determine if DOI would take appropriate action, in order to maintain EPA's schedule for publication of the revised NPL.

This case illustrates OMB's ability to force EPA to choose between delaying an entire executive action or sacrificing a part of it to gain OMB's approval of the major portion. In such instances, absent outside pressures, it will always be EPA which is concerned about the delay, because EPA is utimately responsible to Congress and to the public.

Former EPA Chief of Staff, John Daniel, in testimony before the House Energy and Commerce Subcommittee on Oversight and Investigations, provided another illustration of this pattern:

> * * * There was immense pressure brought by OMB on the Agency to change the nondegradation provision [of State water quality standards], and it was purely philosophical, because there was no cost analyses, cost-effectiveness studies or anything else that I think would have borne out any basis for changing that part of the reg[ulation].
>
> But we wanted the reg[ulation]s out. Other reforms in there were very valuable to our State and Federal partnership and we wanted the regulations published. So as part of the price for getting the regs out, we did change the nondegradation language in the proposal and it turned out that that change ended up being a lighting rod in the regulations that I think probably—I am not entirely familiar with the regs now, but probably impeded the reforms that the States asked for in the first instance.[83]

Examples of rules delayed by OMB review

A September 1985 report by the Environmental and Energy Study Institute and the Environmental Law Institute noted that "the review process [under Executive Order 12291] can be used to delay actions OMB deems to be unwarranted." [84] The report cites OMB review as a delaying factor in EPA issuance of the following rules: effluent guidelines for toxic pollutants (best available technology); hazardous air pollutants (e.g. final arsenic standards); revision of the National Contingency Plan under the Comprehensive Environmental Response, Compensation, and Liability Act; and land disposal regulations under the Resource Conservation and Recovery Act.

In addition, the *Washington Post* reported in July 1985 on a letter from the acting Assistant Administrator for EPA's Office of Air and Radiation to the Deputy Administrator of OIRA. The letter charged OMB with "purposely" delaying publication of Clean Air Act standards and noted that OMB had extended its review for 11 of 12 air standards, some of which had been held at OMB for

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[83] Superfund Report, p. 285.
[84] *Statutory Deadlines Report*, p. 32.

nearly a year. The EPA official's letter stated that "we have a management problem which is getting out of hand." [85]

Similar views were expressed by EPA Administrator Lee Thomas at a September 1985 brown bag lunch with reporters. Although Thomas denied that OMB review has substantial impact on EPA rules, he noted that, "there are a limited number of rules with extensive delays from OMB. It's the process problem that frustrates people." [86]

Iron and steel effluent guidelines

Under the Clean Water Act, EPA is authorized to issue effluent guidelines for polluting substances to achieve the national goal of "fishable and swimmable" waters. The 1977 amendments to the law, following a court decision, specified the industrial categories and pollutants for which EPA was to issue guidelines. Effluent guidelines form the basis for industrial and municipal permits issued by EPA and States which administer the national program and are thus essential to an effective permitting process, to enforcement, and ultimately to the achievement of acceptable water quality.

In testimony on September 27, 1985, before the House Energy and Commerce Oversight Subcommittee,[87] former EPA Chief of Staff John Daniel stated his opinion that OMB served as a conduit to EPA for industry comments on a proposed rule by providing industry comments which were identified as OMB's own analysis. Daniel stated that the comments and analyses received from OMB "were of such particularized technical nature . . . in an engineering sense, that they would have had to come from someone other than the staff of OMB itself." [88]

High level radioactive waste disposal

The process of issuing EPA's proposed rule affecting the disposal of high level radioactive waste from nuclear powerplants and nuclear weapons programs is another example of the delay introduced by OMB review and also an example of improper industry access to a rule before it is proposed for public comment in the *Federal Register.*

EPA is responsible for developing environmental protection requirements for the high level radioactive waste disposal program, which will be implemented by the Nuclear Regulatory Commission and the Department of Energy.

The proposed EPA rule was initially sent to OMB for review under Executive Order 12291 on December 24, 1981, and was finally published in the *Federal Register* a year later on December 29, 1982.[89] EPA Administrator Anne Gorsuch Burford apparently en-

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[85] "Rare Criticism of OMB Draws Some Attention," *Washington Post,* July 18, 1985, p. A21.
[86] *Pesticide and Toxic Chemical News,* September 25, 1985, p. 37.
[87] *EPA: Investigation of Superfund and Agency Abuses, Part 3.* Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 98th Congress, 1st Session (September 27 and 28, 1984), Serial No. 98-98, p. 5. (Hereafter cited as *Superfund Hearings 3.*)
[88] *Ibid.,* p. 5.
[89] Olson pp. 64-66.

gaged in a verbal battle with OMB OIRA Administrator Chris DeMuth and other OMB staff, and threatened to publish the rule without OMB approval.[90]

EPA Chief of Staff John Daniel testified that it appeared that OMB had released the draft proposed rule to industry parties for comment. Daniel stated that an industry representative mistakenly called EPA, in order to provide comments to OMB on the draft rule.[91]

National Ambient Air Quality Standards for particulate matter

Executive Order 12291 requires agencies to "prepare, and *to the extent permitted by law, consider,* a regulatory impact analysis" [92] for each major rule submitted to OMB review (emphasis added). Such a requirement, when requested by OMB for regulations to be issued under a provision which does not permit consideration of costs, puts an agency in conflict with the spirit if not the letter of the governing statute.

The Clean Air Act gives to EPA the responsibility for developing health-based standards for certain pollutants (National Ambient Air Quality Standards—NAAQS), and the United States Court of Appeals for the District of Columbia Circuit has interpreted this to mean that protection of health cannot be compromised by consideration of compliance costs.[93] EPA did prepare a regulatory impact analysis (of revisions to the standard) and submitted it to OMB for review; however, in the preamble to the proposed rule, EPA stated that the EPA Administrator had neither read not been briefed on the analysis, which was apparently not used in developing the proposal.[94]

Former EPA Chief of Staff John Daniel testified that despite the law's requirement that standards be developed on the basis of health, not cost-effectiveness, OMB "kept urging upon us consideration of the costs through certain types of analyses that really were not permitted in terms of making the ultimate decision under the statute." [95] (Daniel also cited the uranium mill tailings regulations as another example of OMB's requiring consideration of costs and said OMB's views were "out of line with what the statute told us.") [96] The EPA docket contains no record of communications between OMB and industry or of OMB's input to the rule. [97]

New Source Performance Standards

New Source Performance Standards (NSPS) for new and modified stationary air pollution sources have been frequently delayed by OMB. Eleven NSPS were submitted to EPA between 3 and 13 months before the statutory deadline of August 7, 1982; EPA negotiations with OMB extended past the deadline for all eleven rules. (Seven were rejected formally by OMB in July 1982; of those, five

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[90] *Ibid,* p. 66, notes 338 and 339.
[91] *Superfund Hearings 3,* p. 80.
[92] Executive Order 12291, Section 3.
[93] Olson, p. 72, note 372.
[94] *Ibid.,* note 374.
[95] *Superfund Hearings 3,* p. 81.
[96] *Ibid.*
[97] Olson, p. 73, note 380.

have since been published.) [98] Two (internal combustion engine and beverage can surface coating) were held at least a year beyond the statutory deadline.[99] An internal EPA study [100] found that the major source of delay (14 months) was OMB review under Executive Order 12291. The NSPS encountered delays caused by the need to respond to OMB's questions on cost-effectiveness and to clarify apparent misunderstandings and misinterpretations, by delayed meetings, and by simple inaction and unresponsiveness on the part of OMB.

While such lengthy OMB delay of EPA rules beyond their statutory due date may occur only for a small percentage of rules submitted for review, these rules may have a potentially significant public health, environmental, economic, or political impact. In addition, the current average review time for EPA rules is 60 days beyond the initial review time set in the Executive order, and thus there could be an average delay of up to 120 days for a proposed major rule. And although section 8 of Executive Order 12291 provides an exemption for "any regulation for which consideration or reconsideration under the terms of this order would conflict with deadlines imposed by statute or by judicial order," [101] such an exemption depends on an agency report to the Director of OMB and was used for less than one percent of EPA rules reviewed from 1981 to 1984.[102]

The beverage can surface coating review also reportedly is an example of two further concerns:

1. OMB's use of criteria beyond the cost-benefit principles of Executive Order 12291; and
2. OMB's acting as a conduit for unidentified industry critiques of a rule.[103]

OMB officials apparently extended their review of the stationary internal combustion engine for two years, primarily because of a dispute with EPA over the proper interpretation of the statutory term "significant" source.[104]

Despite the Clean Air Act's requirement in section 307(d) that all draft rules sent to OMB must be docketed prior to the promulgation of a rule, and that all written OMB comments must also be docketed, at least five of the eleven NSPS fail to include any reference to OMB's comments on the rules or to the accompanying written material from OMB, and most of the dockets contain no indication whatever of OMB's extensive input into the rules.[105]

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[98] *Ibid.*, pp. 68, 70, note 366.
[99] *Ibid.*, p. 68, note 353.
[100] "New Source Performance Standards: Beverage Can Industry—A Case Study," at the request of EPA Administrator William Ruckelshaus by the Emissions Standards and Engineering Division, Office of Air Quality Planning and Standards, Office of Air, Noise, and Radiation, Environmental Protection Agency (August 25, 1983).
[101] Executive Order 12291, Section 8(a)(2).
[102] OMB Annual Report on Executive Order 12291 for 1984 (see note 27 *supra*); see also Table B of this report.
[103] Olson, pp. 69–70.
[104] *Ibid.*, p. 69, note 358.
[105] *Ibid.*, p. 71, note 370.

Ethylene oxide

In March 1985, the Public Citizen Research Group filed suit [106] challenging OSHA's abrupt reversal of its decision to include a short-term exposure limit ("STEL") provision in its final rule on ethylene oxide. The final rule was completed by June 14, 1984 for a court-stipulated *Federal Register* publication date of June 15, 1984. The June 14 document contained provision for a STEL, along with extensive justification of the need for such a measure to adequately protect (primarily hospital) workers from high level exposures to ethylene oxide, which has been linked to an increased risk of cancer, chromosome damage, and spontaneous abortion. The June 15 document published in the *Federal Register* was changed apparently so hastily that all references to a STEL were lined out and the document submitted to the *Federal Register* for publication without retyping. Public Citizen claims there is no evidence in the public record to support such a reversal. The only document supporting the removal of a STEL from the final rule is a June 14, 1984 letter from Chris DeMuth, Administrator of the Office of Information and Regulatory Affairs at OMB. In fact, OSHA admitted in the revised preamble that deletion of the STEL was "largely in response to reservations expressed by OMB." [107]

DeMuth argued that the STEL was impermissible on the grounds of the cost/benefit review criteria of Executive Order 12291. However, Public Citizen argues that the Executive order criteria may only be applied to the extent permitted by law, and that the Occupational Health and Safety Act does not permit consideration of cost, and requires the Secretary of Labor to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health." [108] OSHA itself argued, in its June 14 document, that residual cancer risk and potential for chromosome damage and spontaneous abortions would still remain under an 8-hour standard, and that a STEL was necessary to adequately protect workers from this residual risk.

The DeMuth letter also set forth scientific arguments against the STEL, apparently repeating industry arguments which had already been rejected by OSHA. OSHA subsequently reopened the record for consideration of a STEL and, despite receiving no new factual information, maintained its reversal of the provision of the June 14 final rule which included the STEL. This decision to reverse was taken by OSHA policy staff, unsupported by OSHA scientific staff, health professionals and the lawyer who worked on the standard. The latter group reviewed comments submitted under the original and the extended rulemaking and reported that none of the new material "would require the agency to change the conclusion reached in the draft final standard dated June 14, 1984." [109] Fur-

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[106] U.S. Court of Appeals for the D.C. Circuit, No. 84-1252 and 85-1014.
[107] Preamble 25775, petitioners brief.
[108] 29 U.S.C. 655(b).
[109] Brief of Petitioners at page 27, Robert A. Rowland, Assistant Secretary of Labor, Occupational Safety and Health Administration, No. 84-1252, and No. 85-1014, U.S. Court of Appeals for the District of Columbia Circuit, March 4, 1985.

ther, OSHA scientists stated that "[i]f the decision is made to go along with OMB's reservations and not publish a STEL, the Agency's June [14] 1984 evaluation will need to be changed without having any new substantive information to support such a change in position." [110]

The Public Citizen case illustrates four major concerns which have been raised about OMB review of agency rules:

1. OMB displacement of agency decision-making authority in the rulemaking process;
2. OMB use of review criteria which are statutorily impermissible;
3. OMB acting as a conduit for industry arguments against a rule; and
4. Lack of appropriate scientific and technical expertise on the part of OMB staff reviewing rules.

The Department of Justice brief filed in the case states that Executive Order 12291 is "a valid exercise of the President's authority and that no 'abdication' on the part of the Secretary [of Labor] can be inferred from the record," [111] and that [the Secretary's] final decision not to issue a STEL was well documented and deliberate." [112]

A "friend of the Court" brief filed by five key House Committee chairmen [113] in support of Public Citizen, summarizes the issues of concern:

> * * * OMB's interference in OSHA's ETO standard-setting under the purported authority of Executive Order 12291 violated congressional intent in three ways: It displaced the Secretary of Labor as the Administrative decision-maker; it prevented meaningful public participation in and effective judicial review of the rulemaking; and it caused the application of statutorily impermissible criteria. Such interference with a proper exercise of Congressionally delegated rulemaking authority cannot be justified as a valid application of executive power under the Constitution. It is instead a usurpation of Congress' legislative prerogatives.[114]

The House Members' brief raises strong conerns about Executive Order 12291. "Executive Order 12291 is the cornerstone of a steadily growing Presidential apparatus. . . . Unless it is checked the program embodied in [the Executive Order] will fundamentally damage the administrative process by which our laws are imple-

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[110] *Ibid.*

[111] Brief for Respondents at page 12, *Association of Ethylene Oxide Users* v. *Rowland*, Nos. 84-1252, 84-1392, 85-1014 (D.C. Circuit filed July 19, 1985).

[112] *Ibid.*, p. 14.

[113] Representatives John D. Dingell, Chairman of the Committee on Energy and Commerce; Peter W. Rodino, Jr., Chairman of the Committee on the Judiciary; Jack Brooks, Chairman of the Government Operations Committee; Augustus F. Hawkins, Chairman of the Education and Labor Committee; William D. Ford, Chairman of the Committee on Post Office and Civil Service.

[114] Brief of Representatives John D. Dingell, Peter W. Rodino, Jr., Jack Brooks, Augustus F. Hawkins, and William D. Ford as *Amici Curias* in support of petitioners, *Public Citizen Health Research Group* v. *Robert A. Rowland, Assistant Secretary of Labor, Occupational Safety, and Health Administration* in the U.S. Court of Appeals for the D.C. Circuit, Nos. 84-1252, 84-1392 and 85-1014, June 20, 1985, p. 49. (Hereafter cited as Ethylene Oxide *Amici* Brief.)

mented, the legislative system by which our laws are enacted and monitored, and the separation of powers upon which our system of government is based." [115]

Safety rule for oil and gas drilling

OMB recently directed OSHA to develop a new proposed safety rule for oil and gas drilling after the agency had spent five years in developing its proposed rule. OMB apparently first tried to kill the rule, was thwarted by the intervention of career staff and a top aide to the Secretary of Labor, and then directed OSHA to resubmit the proposal as a major rule. The *Washington Post* reported that "the failure of former OSHA chief Robert A. Rowland and his aides to rebut Office of Management and Budget criticism of the way the proposal was put together *could add a year or two to the rulemaking process* * * *" [Emphasis added.] [116] The center of the dispute was an October 10, 1984 letter from OMB quoting cost figures developed by the International Association of Drilling Contractors ($588 million a year) and directing OSHA to redo its estimates of the cost of compliance to industry ($24 million a year). The OSHA proposal was designed to protect the approximately 95,000 nonunion workers in the oil and gas drilling and servicing industry, one of the most hazardous of occupations, according to the Bureau of Labor Statistics.

FOOD AND DRUG ADMINISTRATION

Infant formula

The Infant Formula Act of 1980 gave the FDA rulemaking authority to set up a pre-testing, quality control system for infant formula. The "friend of the court" brief filed in the OSHA ethylene oxide case by five House Committee Chairmen states that "The application of OMB-imposed cost-benefit standards has caused delay in the promulgation of FDA regulations * * * thereby allowing a substantial amount of defective infant formula to enter the market." [117]

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[115] *Ibid.*, pp. 7–8.

[116] "Proposed OSHA Safety Rule Held Up" *Washington Post*, July 11, 1985, p. A19.

[117] Ethylene Oxide *Amici* Brief, p. 16, and referencing *Infant Formula: The Present Danger, Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce*, 97th Congress, 2nd Session (1982).

APPENDIX A

Selected EPA Rules Identified as Having Problems with OMB Review
(List prepared for Lee Thomas, May or June 1985;
Comments from EPA document, "OMB Extended Reviews")

Program	Rule	Date Sent to OMB	Date Extended	Date Cleared	Date Published	Date Withdrawn by EPA	Comments
Air	PM 10 Implementation (NAAQS for particulate matter)	6/1/84 (proposal)	6/11/84	2/27/85	4/2/85		Proposal: OMB requested EPA to do a study of the quantitive differences in the costs and benefit between the section 110 and Part D approaches.
	NAAQS for NO_2	11/20/84	12/20/84				Statutory deadline: 12/31/80 OMB questioned the determination versus statistical form of the standard.
	Importation of non-conforming vehicles and engines	9/14/84	9/26/84				OMB sent this package to DOJ for comment, and received DOJ's study in mid-January. OMB submitted the study to EPA in February. At the 3/28/85 meeting, OMB asked EPA to revise the package to include another option that maintains certain aspects of the modification and test program. EPA will complete this work in several weeks (from 4/26/85). OMB asked EPA to withdraw this rule, and resubmit it as a new review. OAR does not want to do this.

*Complete list on file

Selected EPA Rules

Program	Rule	Date Sent to OMB	Date Extended	Date Cleared	Date Published	Date Withdrawn by EPA	Comments
Air	NESHAPS for Inorganic arsenic	6/29/84	7/11/84				The agencies met on 3/28/85 to discuss policy issues that are analogous to radionuclides and benzene. OMB indicated then that they would complete their review in a few weeks. Then on 4/22/85, OMB asked the Agency to revise the cost-benefit analysis discounting the benefits.
OPTS	Sec. 4(f) criteria for revoking a pesticide registration	7/6/84	7/18/84				OMB provided language to EPA regarding the start of the 4(f) clock. EPA is discussing the proposed language. Also, EPA submitted revisions on other portions of the rule to OMB. (4/5/85)
RCRA	Codification rule (interim final)	12/7/84					OMB failed to respond by the 12/17 deadline. Yet EPA received a memo on 12/21 extending the non-major codification rule. OMB staff disagrees with EPA's position that this is not a major rule because the costs are imposed by the statute. OMB requested a copy of the rule indicating which parts Congress mandated and which EPA is initiating. EPA submitted this material on 1/7. OMB also requested economic analysis separating the cost imposed by the statute

Selected EPA Rules

Rule	Date Sent to OMB	Date Extended	Date Cleared	Date Published	Date Withdrawn by EPA	Comments
Codification Rule cont'd.						from the cost imposed EPA initiated actions. EPA has not yet sent this to OMB. A meeting will be held on 1/10 to discuss general principles. OMB requested that EPA delete the lengthy discussion on delisting criteria from the codification rule. EPA is amenable to this idea. OMB has not commented on the paperwork aspect of the codification rule. (1/10/85)
						OMB staff requested an economic analysis and a copy of the rule indicating which parts Congress mandated. EPA will provide this information. Also, OMB suggests that EPA propose certain portions of this rule, rather than publish it all as interim final. EPA is waiting for OMB to indicate which portions should be proposed.
						OMB made two requests: 1) a copy of the rule distinguishing the statutory language (verbatim) from the policy interpretations; and 2) an economic analysis separating the cost imposed by the statute from the costs imposed by EPA's interpretation. EPA submitted the first request on

Selected EPA Rules

Programs	Rule	Date Sent to OMB	Date Extended	Date Cleared	Date Published	Date Withdrawn by EPA	Comments
RCRA	Codification Rule Cont'd.						1/7, and the second on 1/15. The agencies met on 1/10 to discuss general principles, and on 1/23 to discuss legal issues and the option of proposing some portions and promulgating others. OSWER sent OMB an outline of which sections to propose and which sections should become final during the week of 1/25. EPA met with OMB on 3/29. OMB raised a new issue about the definition of release presented in the final rule. (4/5/85)

Selected EPA Rules

Program	Rule	Date Sent to OMB	Date Extended	Date Cleared	Date Published	Date Withdrawn by EPA	Comments
RCRA,cont.							
	Leaking underground storage tanks	3/4/85 (proposed rule)	3/11/85				Statutory deadline, March 1, 1985. OSW briefed OMB on 3/15, and OMB requested: (1) background information documents, (2) statistics from OSW's computer program, (3) copies of comments on the 1981 regulations, and (4) a report prepared by OPPE (OPA). OSW submitted all of these except for the computer printout on 3/19. OMB and EPA met on 4/2 to determine how the risk assessment for waste oil is related to this regulation. EPA and OMB met again on 4/16 to discuss the precedential nature of this rule for LUST, the need to broaden the preamble discussion on alternative control options, and the need for a more quantitative analysis of options. OSW will accept OMB's suggestion and respond in several weeks. 4/26/85
	Nat'l Contingency Plan	9/24/84	9/26/84	1/ /85			OMB questions on cost analysis and the CERCLA policy and how it relates to other statutes.

Selected EPA Rules

Program	Rule	Date Sent to OMB	Date Extended	Date Cleared	Date Published	Date Withdrawn by EPA	Comments
RCRA (cont.)							
	Listings: mixtures rules	1/22/85	2/8/85	4/5/85			OMB questioned the effects of this rule on other EPA programs. OSW sent Steering Committee and Red Border comments to OMB on 2/20, and telephoned Bozen on 3/28 to discuss certain elements of the rule. OMB requested OSW's response to Red Border comments, and OSW will submit them. Also, OMB is concerned about a sentence in the preamble that states that comments between OMB and EPA are available in the docket. (4/5/85)
Water							
	Effluent guidelines for iron & steel (minor amendment)	7/24/84	8/3/84			2/28/85	12/84 EPA/OMB disagreement on "incremental vs. total cost issue"
	Ocean dumping "quick fix"	1/10/85	1/25/85				OMB requested revisions on 2/25, and met with EPA on 2/27. EPA submitted the revisions on 3/19, and OMB presented them to the Corps. The Corps has problems with EPA's package and OMB is trying to resolve them. OW met with OMB's budget office on 4/18. OMB suggested that EPA publish an ANPRM to address the Corps issues, and move ahead with this proposal. OMB will discuss this with the Corps. The OMB budget office is writing a memo for its management that explains the issues. (4/26/85)

APPENDIX B

Prepared for April 16, 1985 oversight hearing by House Energy and Commerce Oversight Subcommittee

EPA'S PROPOSED ASBESTOS BAN AND PHASEDOWN RULES

CHRONOLOGY OF MAJOR EVENTS

Oct. 17, 1979	Environmental Protection Agency (EPA) issues an advance notice of proposed rulemaking (ANPR) addressing commercial and industrial use of asbestos (44 Fed. Reg. 60061). In the ANPR, the Agency announces its intention to explore the possible application of the Toxic Substances Control Act (TSCA) to reduce the risk to human health from exposure to asbestos throughout its life cycle. EPA states in the ANPR that its regulatory strategy is anticipated to evolve chiefly from a combination of two approaches: (1) the promulgation of rules to prohibit the manufacture, processing, and use of certain asbestos-containing products or product categories, and (2) limitations on the annual amount of asbestos imported and produced in the United States. The Agency emphasizes that: "[u]nder section 9 of TSCA, 15 U.S.C. 2608, the Administrator will consider whether risks from asbestos exposure could be reduced to a sufficient extent by actions taken by other agencies under other Federal laws."
July 30, 1982	EPA publishes a final reporting rule under Section 8(a) of TSCA to support the Agency's assessment of asbestos risk (47 Fed. Reg. 33198).
Sept. 2, 1982	EPA publishes a rule under Section 8(d) of TSCA to require the submission of unpublished health and safety studies on asbestos (47 Fed. Reg. 38780).
June 8 & 9, 1983	Office of Toxic Substance (OTS) develops a regulatory strategy for asbestos at a staff retreat.
July 25, 1983	EPA Deputy Administrator Alvin Alm approves the OTS asbestos regulatory strategy providing for a ban of certain asbestos product categories and the phasedown of production of remaining uses of asbestos fiber.
July 27, 1983	Don R. Clay, Acting Assistant Administrator for Pesticides and Toxic Substances, presents the first public announcement of EPA's proposed asbestos regulatory strategy before the Subcommittee on Toxic Substances and Environmental Oversight of the Senate Committee on Environment and Public Works.

Feb. 23, 1984	Letter from Chairman John D. Dingell to EPA Administrator William Ruckelshaus inquiring about EPA's asbestos regulatory strategy.
Feb. 24, 1984	Alvin Alm chairs an Agency options selection meeting to consider the asbestos ban and phasedown rules. At the options selection meeting, EPA officials agree on a regulatory strategy for asbestos which combines a ban of selected products with a phasedown of asbestos production over a period of several years. The meeting attendees include James Barnes, General Counsel, John Moore, Assistant Administrator for Pesticides and Toxic Substances, and Milton Russell, Assistant Administrator for Policy, Planning, and Evaluation.
Mar. 22, 1984	18-page letter sent to James Barnes and John Moore from Edward W. Warren, Special Counsel to the Asbestos Information Association/North America (AIA/NA). The letter opposes EPA's asbestos regulatory strategy and argues that Section 9 of TSCA requires EPA to defer to OSHA.
Mar. 26, 1984	Staff members of the Office of Management and Budget (OMB) are briefed by EPA staff from the Office of Toxic Substances (OTS) and the Office of Policy, Planning, and Evaluation (OPPE) on the Agency's asbestos regulatory program. The briefing covers the health risks of asbestos, the proposed ban and phasedown strategy for industrial and commercial uses of asbestos, and EPA's asbestos-in-schools and public buildings program.
April 16, 1984	Meeting between James Barnes, John Moore, and EPA staff and Edward Warren, Special Counsel to the AIA/NA. AIA presented their case against the proposed ban and phasedown rules.
April 23, 1984	Letter from William Ruckelshaus of EPA to Chairman John D. Dingell explaining why action under TSCA was necessary to reduce asbestos risks. In this letter the EPA Administrator stated that: "EPA is proposing to substantially eliminate rather than control asbestos because we believe that the risks from the life cycle of asbestos (i.e., mining, milling, manufacturing, use, removal and disposal) are unreasonable even when asbestos is controlled .... Since EPA's authority to ban a chemical, based upon exposure from the life cycle of the chemical, is unique among Federal authorities and the OSHA standards do not apply to most public employees or non-occupational populations, the use of both TSCA and OSHA authorities is appropriate. [T]he Occupational Safety and Health Act has been

interpreted to mean that OSHA standards must be economically and technologically feasible. Given these limitations, there are significant residual risks after OSHA's standards are in place."

April 30, 1984 — Memorandum from Milton Russell to Alvin Alm, James Barnes, and John Moore on the "Use of TSCA to Control Workplace Risks." The memorandum discusses "EPA's workplace-related authority under TSCA," five options available with respect to existing chemicals, and the implications of each option for the proposed asbestos rules.

May 14, 1984 — EPA sends the proposed ban rule to OMB for a 60-day review under Executive Order 12291. The proposed rule prohibits the manufacture, processing, and distribution in commerce of asbestos in four product categories: cement pipe and fittings, roofing felts, flooring felts (and felt-backed floor sheet), and floor tile. EPA considers the regulatory authority of the Consumer Product Safety Commission (CPSC) and the Occupational Safety and Health Administration (OSHA) pursuant to Section 9 of TSCA, and EPA concludes that "action under those authorities will not sufficiently reduce the risks" addressed by the ban rule.

May 18, 1984 — Proposed ban rule approved by James Barnes during Red Border review.

July 9, 1984 — Letter from Chairman John D. Dingell to EPA Administrator Ruckelshaus requesting documents relating to the asbestos ban and phasedown regulations.

Aug. 7, 1984 — William Ruckelshaus provides the Subcommittee on Oversight and Investigations with documents concerning EPA's asbestos rules in response to the Chairman's letter request of July 9, 1984.

Aug. 13, 1984 — Meeting between Brian Mannix of OMB and Amy Moll, Allen Jennings, and Ronn Dexter of EPA on the cost-effectiveness of the proposed asbestos rules.

Aug. 15, 1984 — EPA sends the proposed phasedown rule to OMB for a 60-day review under Executive Order 12291. In its rule, EPA proposes to phase down asbestos mining and importation over a ten-year period. After ten years, mining or importation of asbestos would be prohibited except for those persons granted special permission by EPA through an exemption process. EPA also proposes to ban the manufacture, importation, processing, and distribution in commerce of certain asbestos cloth products. EPA

considers the regulatory authority of CPSC and OSHA pursuant to Section 9 of TSCA and concludes that "action under those authorities will not sufficiently reduce the risks" addressed by the phasedown rule.

Aug. 22, 1984 — Alvin Alm approves an "Interim Policy for Referring Workplace Exposure Problems to the Department of Labor." Under this policy, "EPA will not refer a chemical problem when it determines that DOL cannot adequately address the problem. Considerations that might yield that determination include: (1) too much of the exposure lies beyond the reach of the OHSAct and MSHAct; (2) a single rule under TSCA would be more efficient than piecemeal regulation under several authorities; or (3) a full or partial ban on the production or use of the chemical, or other remedies uniquely available under §6 of the TSCA, provide the most effective or efficient remedy.

Aug. 31, 1984 — James Barnes approves the phasedown rule in Red Border review.

Sept. 14, 1984 — Meeting between Brian Mannix of OMB and Steven Weil and Michael Shapiro of EPA on the proposed asbestos rules. The EPA officials agree to provide OMB with additional analyses on asbestos uses, substitutes, costs, and benefits. Mr. Mannix (1) expresses objection to the Agency's choice of product categories subject to the ban, except asbestos cement pipe and asbestos cloth products, (2) argues that health benefits (cancer deaths avoided) associated with the proposed rules should be discounted over the latency period (30 to 40 years) for lung cancer and mesothelioma, and (3) comments on the health risks associated with chrysotile (white) and crocidolite (blue) asbestos.

Oct. 15, 1984 — Carlos Tellez of OMB telephones Rick Tinsworth of EPA to discuss the asbestos ban and phasedown rules. Mr. Tellez states that: (1) OMB officials believe, based on available data, that the ban rule is cost-effective for all product categories, except possibly floor tile, (2) OMB officials are not convinced that the phasedown rule is cost-effective, (3) OMB wants EPA to submit data on the cost-effectiveness of the phasedown rule assuming a ban of four products plus cloth, (4) the issue of discounting of cancer deaths avoided is still unresolved, and (5) OMB wants EPA to submit a sensitivity analysis applying a 2 to 6 percent discount rate to health benefits. Mr. Tellez informs Mr. Tinsworth that he and Mr. Mannix of OMB

have presented the ban and phasedown rules to Robert Bedell, Deputy Administrator of OMB's Office of Information and Regulatory Affairs (OIRA), and that the new questions include some from Mr. Bedell. Mr. Tellez adds that neither Robert Bedell nor Douglas Ginsburg, OIRA's Administrator, have reached any final decisions on the ban or phasedown rules.

Oct. 15, 1984 — Meeting between Douglas Ginsburg of OMB and Milton Russell of EPA. Mr. Russell seeks final resolution on the two asbestos rules.

Oct. 18, 1984 — Briefing for Jack Campbell, EPA's Deputy Assistant Administrator for Policy, Planning, and Evaluation, by OPPE staff and OTS staff on the status of the proposed asbestos rules undergoing OMB review. In their briefing, the staff members emphasize that the OMB proposal to discount cancer cases avoided over a 30 to 40-year latency period would represent a dramatic departure from past EPA practice, would have major implications for the Agency's carcinogen policies, and would greatly diminish projected benefits of the proposed asbestos rules. EPA staff also inform Mr. Campbell that they expect OMB to oppose the phasedown rule and to support the ban of only three to four products. According to the EPA staff, OMB officials maintain that the phasedown amounts to a "slow ban" and that EPA should adopt an alternative approach which calls for an annual reevaluation of the asbestos market to determine the cost-effectiveness of banning specific products.

Oct. 19, 1984 — Meeting between Robert Bedell of OMB and Jack Campbell of EPA to discuss the status of various EPA rules, including the two proposed asbestos rules, undergoing OMB review pursuant to Executive Order 12291. At this meeting, Mr. Bedell expresses approval of EPA's proposed ban on certain products and expresses opposition to the proposed phasedown rule. These conclusions are premised on the discounting of benefits over the latency period of asbestos-related diseases at a discount rate of 4 percent. Mr. Campbell responds that this outcome is unacceptable and expresses opposition to the application of the proposed approach to discounting of benefits in the case of the two asbestos rules. Messrs. Campbell and Bedell agree to schedule another meeting on this subject with their staffs present.

Oct. 29, 1984 — Meeting attended by OMB officials (Douglas Ginsburg, Robert Bedell, Brian Mannix, and Carlos

Tellez) and EPA officials (Jack Campbell, Ronn Dexter, and Michael Shapiro) to discuss the cost-effectiveness of the proposed asbestos rules. The discussion focuses on the issue of discounting of benefits and EPA and OMB officials express strong differences of opinion on this matter.

Oct., 1984 or Nov., 1984 — Telephone call between Michael Horowitz of OMB and James Barnes of EPA. Mr. Barnes expresses frustration about OMB's failure to move the asbestos rules. Mr. Horowitz indicates that OMB may have a Section 9 problem with the proposed rules.

Nov., 1984 — Jack Campbell asks Alvin Alm and John Moore whether they want to "cave" into OMB on the asbestos rules or whether he is authorized to inform OMB that he intends to elevate the dispute on the asbestos rules to higher-level EPA officials. Messrs. Alm and Moore respond that EPA will not reconsider the rules and direct Mr. Campbell to elevate the issue within the Agency.

Dec. 11, 1984 — Meeting at the White House seeking to improve general relations between the Office of Management and Budget and the Environmental Protection Agency. Meeting attendees include Douglas Ginsburg of OMB, William Ruckelshaus, Lee Thomas, and Milton Russell of EPA, and Craig Fuller, Fred Fielding, and Randy Davis of the White House staff. The meeting does not focus specifically on asbestos but EPA officials cite the asbestos rules as an example of a case which needs resolution. Douglas Ginsburg responds that OMB has OSHA problems with the proposed rules and that these problems may go beyond questions previously raised about the need to take into account OSHA's proposal to lower its workplace exposure standard in any benefit calculations under TSCA.

Mid-Dec., 1984 — Meeting between Robert Bedell of OMB and Jack Campbell of EPA. Mr. Campbell summarizes the three issues which OMB and EPA staff had discussed: (1) the "blue-white" issue, (2) hazards posed by asbestos substitutes, and (3) cost-effectiveness issues, including the discounting of health benefits. Mr. Campbell asks if OMB has any other concerns, particularly in view of Mr. Ginsburg's comment at the December 11th White House meeting. Mr. Bedell responds that he is not aware of any other issues.

Mr. Campbell also informs Mr. Bedell that EPA does not agree that the phasedown rule should be dropped

because of a discounting of benefits analysis. He informs Mr. Bedell that the controversy over the asbestos rules will be elevated to higher level EPA officials.

Dec. 21, 1984 — Acting EPA Administrator Lee Thomas advises James Barnes that he will ask the White House to approve Mr. Barnes as Acting Deputy Administrator.

Dec. 24, 1984 — Meeting between Douglas Ginsburg and Robert Bedell of OMB and Lee Thomas and James Barnes of EPA. Mr. Bedell and Mr. Barnes are designated to meet to try to get the issues joined on asbestos.

Dec. 27, 1984 — James Barnes of EPA meets with Robert Bedell at OMB to discuss the backlog of EPA regulations under review at OMB, including the proposed asbestos ban and phasedown rules and proposed amendments to the National Contingency Plan. Immediately prior to his meeting with Mr. Barnes, Mr. Bedell provides him an internal OMB briefing book on the asbestos regulations. Mr. Barnes reviews the briefing book, including a cover memorandum and legal memorandum which conclude that EPA is required by Section 9 of TSCA to refer asbestos risks to the Occupational Safety and Health Administration and the Consumer Product Safety Commission. The cover memorandum also concludes that the EPA proposals, especially the 10-year phasedown rule, are not cost-effective and that EPA should defer to OSHA in the case of asbestos as a matter of policy, regardless of the Agency's interpretation of Section 9.

Following his review of the briefing book, Mr. Barnes discusses with Mr. Bedell the issues holding up resolution of EPA's two proposed asbestos rules. Mr. Bedell asks James Barnes "how do you square the asbestos rules with Section 9 of TSCA", and Mr. Barnes responds that he will have to look at this question. Mr. Bedell also raises questions about EPA's cost-benefit analyses of the asbestos rules. Mr. Barnes takes the OMB legal memorandum back with him to EPA.

Dec. 27, 1984 (5:00 p.m.) — James Barnes briefs Lee Thomas, Milton Russell, and John Moore about his meeting with Robert Bedell earlier that day and shows them his notes of the OMB cover memorandum criticizing the proposed asbestos rules. Mr. Barnes advises Messrs. Russell and Moore that they should follow up on the economic and technical issues raised by OMB and that he would follow up on the legal questions involving Section 9.

Dec. 28, 1984 (2:00 p.m.)	Meeting held at the request of James Barnes with staff members of EPA's Office of General Counsel (OGC) (Gerald Yamada, Stanley Abramson, Ruth Bell, and Alan Carpien) to discuss Section 9 of TSCA. Ms. Bell and Mr. Carpien discuss the Alm interim policy on workplace risks and the Agency's prior interpretations allowing broad discretion to the EPA Administrator under Section 9. At the meeting, Mr. Barnes requests a generic memorandum concerning Section 9 on an expedited basis. He does not mention the asbestos rulemakings, does not share OMB's conclusion that Section 9 requires referral of asbestos, and does not provide the OGC staff with a copy of the OMB legal memorandum.
Jan. 1, 1985	Alan Carpien of OGC works from 8 p.m. to 1 a.m. preparing a legal memorandum on Section 9(a) of TSCA. The memorandum indicates that EPA has broad discretion under Section 9. It emphasizes that judicial review of a decision of EPA to refuse to refer a risk under Section 9(a) "is limited solely to whether EPA has examined the other statutes, not whether EPA's decision was right or wrong on the facts."
Jan. 7, 1985	James Barnes begins his assignment as Acting Deputy Administrator.
Jan. 7, 1985	Meeting held at the request of James Barnes with OGC staff members (Gerald Yamada, Stanley Abramson, Ruth Bell, and Alan Carpien) to discuss Section 9 of TSCA. The meeting focuses on the Carpien memorandum and a briefing book which the OGC staff had prepared on the language and legislative history of Section 9. Ruth Bell, Alan Carpien, and Stanley Abramson underscore the broad scope of the Administrator's discretion under the statute. Mr. Barnes does not take any position concerning Section 9 of TSCA and does not mention the proposed asbestos rules. He simply asks questions about the staff's interpretation of Section 9. At the conclusion of the meeting, Mr. Barnes states that he plans to think about the matter further and to discuss it again with the OGC staff.
Jan. 8, 1985	Meeting attended by Lee Thomas, James Barnes, John Moore, Milton Russell, and Philip Angell. James Barnes discusses EPA's proposed asbestos rules and the process specified for referral of chemical risks to other agencies under Section 9 of TSCA.
Jan. 8, 1985	James Barnes suggests that Robert Bedell arrange a meeting with OMB, OSHA, and CPSC officials to discuss Section 9 of TSCA and the possibility of

	referrals to these agencies by EPA. Bedell agrees to arrange the meeting with OSHA but concludes that CPSC should not be included because of its independent status.
Jan. 14, 1985	Memorandum from John Moore to James Barnes concerning Section 9 referrals and asbestos. In this memorandum, Dr. Moore emphasizes that significant risks from asbestos will remain even after OSHA adopts its proposed revisions to worker exposure standards.
Jan. 18, 1985	Telephone conversation between Michael Horowitz of OMB and James Barnes of EPA. Mr. Barnes urges Mr. Horowitz to attend the OMB-OSHA-EPA meeting later that day.
Jan. 18, 1985 (11 a.m.)	Meeting at OMB attended by EPA officials (James Barnes, John Moore, and Milton Russell), OMB officials (Douglas Ginsburg, Robert Bedell, and Michael Horowitz), and OSHA officials (Robert Rowland and Frank Lilly). OMB officials express the opinion that Section 9 of TSCA requires a referral of asbestos from EPA to OSHA. The discussion also focuses on the need to develop a Memorandum of Understanding between EPA and the Department of Labor on Section 9 referrals.
Jan. 18, 1985 (2 p.m.)	Meeting between Lee Thomas, James Barnes, Milton Russell, and John Moore. The OMB/OSHA/EPA meeting is reviewed. Mr. Thomas is informed that OSHA has been "signalled" that EPA will be referring asbestos under Section 9 of TSCA. Mr. Thomas is told that EPA has no choice but to refer asbestos to OSHA under Section 9. Mr. Thomas agrees that the referral should be made.
Late Jan. 18, 1985 or Week of Jan. 21, 1985	John Moore prepares the first draft of a letter to the Department of Labor (DOL), indicating that EPA might be referring three chemical substances to DOL pursuant to Section 9 of TSCA: asbestos, methylene dianiline (MDA), and certain glycol ethers.
Week of Jan. 21, 1985	Milton Russell provides comments on Dr. Moore's draft referral stating that "the legal devil made us do it."
Jan. 24, 1985	John Moore informs Don Clay, Director of the Office of Toxic Substances, that a decision has been made to refer asbestos to OSHA and CPSC and that an announcement is anticipated the week of January 28th.

Jan. 23 or 25, 1985	Meeting between James Barnes, John Moore, and Stanley Abramson to discuss the draft referral letter to the Department of Labor on asbestos. James Barnes provides comments on the proposed draft and requests Mr. Abramson to refine the draft following the meeting. Mr. Barnes also requests Dr. Moore and Mr. Abramson to review the draft with the Department of Labor before it is signed in final form.
Jan. 28, 1985 (approx. 9:30-10:30 a.m.)	Discussion between Lee Thomas, James Barnes, Milton Russell, John Moore, and Philip Angell following a meeting of EPA Assistant Administrators. The parties discuss the process for the referral of asbestos risks to OSHA in a time frame of two to three weeks. James Barnes states that the ban and phasedown rules would be withdrawn from OMB following any referral, and Lee Thomas emphasizes the need for a formal opinion on the referral matter by the Office of General Counsel. Mr. Thomas also notes the importance of presenting the referral as a "positive resolution of the asbestos rule."
Jan. 28, 1985	James Barnes sends a note to Gerald Yamada saying he wants to see him right away, and Mr. Yamada leaves a meeting in Room 1103 to meet with Mr. Barnes. Mr. Barnes informs Mr. Yamada that the Agency has decided to refer asbestos to OSHA and CPSC and that he wants a legal memorandum on Section 9 of TSCA to support the action "as quickly as possible."
Jan. 28, 1985	Gerald Yamada provides James Barnes his first draft legal memorandum on Section 9. He also provides a copy to Stanley Abramson.
Jan. 29, 1985 (8 a.m.)	EPA senior staff meeting attended by Lee Thomas, James Barnes, Linda Fisher, Philip Angell, Josephine Cooper and Russell Dawson. A press briefing on TSCA is the first item on the agenda, and the parties discuss the need to alert OMB about the press briefing.
Jan. 29, 1985 (9 a.m.)	Meeting with James Barnes, Philip Angell, David Cohen, Debra Dobkowski, Johanna Hunter, and other EPA staff to discuss the planning of a press briefing on Section 9 of TSCA and asbestos for later in the week. They seek to list necessary fact sheets, including a legal brief, and agree to meet again at 2 p.m. on January 31st for a rehearsal of anticipated questions and answers.
Jan. 29, 1985	James Barnes requests Gerald Yamada to revise his

	legal memorandum and provides him a list of three issues to be addressed. These three issues are: (1) under what circumstances EPA is required to submit a report to another Federal agency pursuant to Section 9 of TSCA; (2) the authority EPA has to act (a) pending a response from that agency and (b) after that agency has responded; and (3) the discretion the Administrator has to use the authority under TSCA to regulate a chemical substance or mixture that might be addressed under statutory authority administered by EPA.
Jan. 30, 1985	Gerald Yamada provides James Barnes with his second draft legal memorandum on Section 9 of TSCA. Mr. Barnes informs Mr. Yamada that the Agency would like to make a press announcement if the legal memorandum can be completed. James Barnes provides various comments on the second draft legal memorandum, and Gerald Yamada circulates his third draft later in the day.
Jan. 30, 1985	James Barnes telephones Robert Bedell of OMB to inform him that EPA has concluded that Section 9 of TSCA requires the Agency to refer the occupational risks of asbestos to OSHA and the consumer risks to CPSC. Mr. Barnes says that he expects to announce this decision on Friday, February 1. He also states that if the Agency continues on its current course, it will request OMB to return the proposed asbestos ban and phasedown rules to EPA.
Jan. 31, 1985 (2:30 p.m.)	Pre-briefing for the press announcement on the asbestos referral attended by James Barnes, Gerald Yamada, David Cohen, Philip Angell, and John Moore. Gerald Yamada is asked if his legal memorandum will be part of the press packet, and he says that he has to go to his office to sign it.
Jan. 31, 1985	Gerald Yamada completes his legal memorandum to Lee M. Thomas on "The Relationship of TSCA To Other Federal Programs Under Section 9." The memorandum concludes that Section 9(a) of TSCA is intended to assure that other Federal agencies have an opportunity to protect against a specific chemical risk under their authorities before the EPA Administrator uses his authorities in Sections 6 and 7 to regulate existing chemicals.
Jan. 31, 1985	James Barnes telephones Robert Bedell and requests him to return the proposed asbestos ban and phasedown rules to EPA.
Jan. 31, 1985	Dr. John Moore sends letter to the Occupational Safety and Health Administration and the Consumer

	Product Safety Commission informing these agencies that EPA intends to send them a referral of asbestos pursuant to Section 9 of TSCA.
Jan. 31, 1985 (approx. 5:30 p.m.)	Rehearsal of anticipated questions and answers for the February 1st press announcement of the Agency's plans to refer asbestos to OSHA and CPSC. The meeting attendees include James Barnes, Gerald Yamada, David Cohen, Philip Angell, and John Moore.
Feb. 1, 1985 (10 a.m.)	Acting Deputy Administrator James Barnes holds a press briefing announcing EPA's intent to refer the consumer and occupational risks associated with asbestos and 4, 4-methylenedianiline (MDA) to CPSA and OSHA. He emphasizes that "this referral process is mandated by Section 9 of the Toxic Substances Control Act (TSCA)."
Feb. 1, 1985 (11:30 a.m.)	James Barnes briefs Senate staff members on his 10 a.m. press announcement.
Feb. 1, 1985 (4:15 p.m.)	Meeting at the Old Executive Office Building on risk assessment attended by James Barnes and Lee Thomas of EPA, Douglas Ginsburg and Robert Bedell of OMB, and Randy Davis of the White House staff. Asbestos is mentioned briefly.
Feb. 25, 1985	Letter from Chairman John D. Dingell to Lee M. Thomas. The letter requests numerous documents and informs Mr. Thomas that the Subcommittee has initiated an inquiry into the circumstances surrounding the Agency's submission of two draft proposed rules on asbestos in 1984 and the withdrawal of those rules from OMB in 1985. The letter expresses concern that the decision reflected in Mr. Barnes' February 1st announcement "is based on an unduly restrictive reading of TSCA" and "will irreparably undermine EPA's ability to regulate chemicals which present an unreasonable risk to health or the environment." Chairman Dingell requests Mr. Thomas to "immediately withhold referring asbestos under this highly questionable reading of Section 9" until such time as the Subcommittee completes its review.
Mar. 1, 1985	Meeting between Lee Thomas, John Moore, and Gerald Yamada of EPA and Robert Roland and Ford B. Ford of the Department of Labor to discuss a Memorandum of Understanding between the agencies on workplace risks. The meeting focuses on the implementation of Section 9 of TSCA.
Mar. 8, 1985	James Barnes issues a memorandum to John Moore,

Milton Russell, and Gerald Yamada on "Asbestos/MDA." The memorandum recommends that EPA "should temporarily halt the work on the MDA and asbestos [referral] packages [to OSHA and CPSC] and ask OGC to formally address a series of legal questions that have either arisen or that clearly need to be addressed to determine whether the findings that trigger a Section 9 report are present with respect to these chemicals and, if so, how the report should be structured." Mr. Barnes indicates that he has "set forth some of the possible legal questions in draft form later in this memo" and directs "OGC, the program office and the policy office ... [to] review this list of possible legal issues and ... [to] modify and/or add to it as they believe appropriate." He also directs them to "identify any policy issues that they believe need to be addressed." He concludes that: "[a]fter these have been presented to the Administrator, he can proceed to make final decisions on whether Section 9 reports are required for MDA and/or asbestos, and if so, what their form should be, based on a thorough analysis and discussion of the legal and policy issues."

Mar. 8, 1985 — EPA Administrator Lee Thomas sends a letter to Chairman John D, Dingell in response to the Chairman's letter of February 25, 1984. Mr. Thomas transmits the March 8th Barnes memorandum on asbestos and MDA and states that "[a]t the present time, the Agency is giving further review to the legal and policy questions raised by such a referral ... Further action on the asbestos referral will not take place until these issues are resolved to my satisfaction. I will keep you informed of any action this Agency intends to take with respect to a referral under Section 9 of TSCA."

Mar. 21, 1985 — EPA's Office of General Counsel completes a first draft of a legal memorandum on Section 9(a) of TSCA pursuant to James Barnes' directive of March 8, 1985.

Mar. 27, 1985 — Robert Bedell of OMB sends a letter to James Barnes of EPA. The letter concludes that: (1) EPA's proposed asbestos phasedown rule is not cost-effective; (2) only one of EPA's proposed ban rules for asbestos (asbestos cloth) is cost-effective; (3) EPA failed to analyze asbestos substitutes adequately; and (4) EPA should prepare a Section 9 report to OSHA and CPSC on asbestos documenting any unreasonable workplace or consumer risks.

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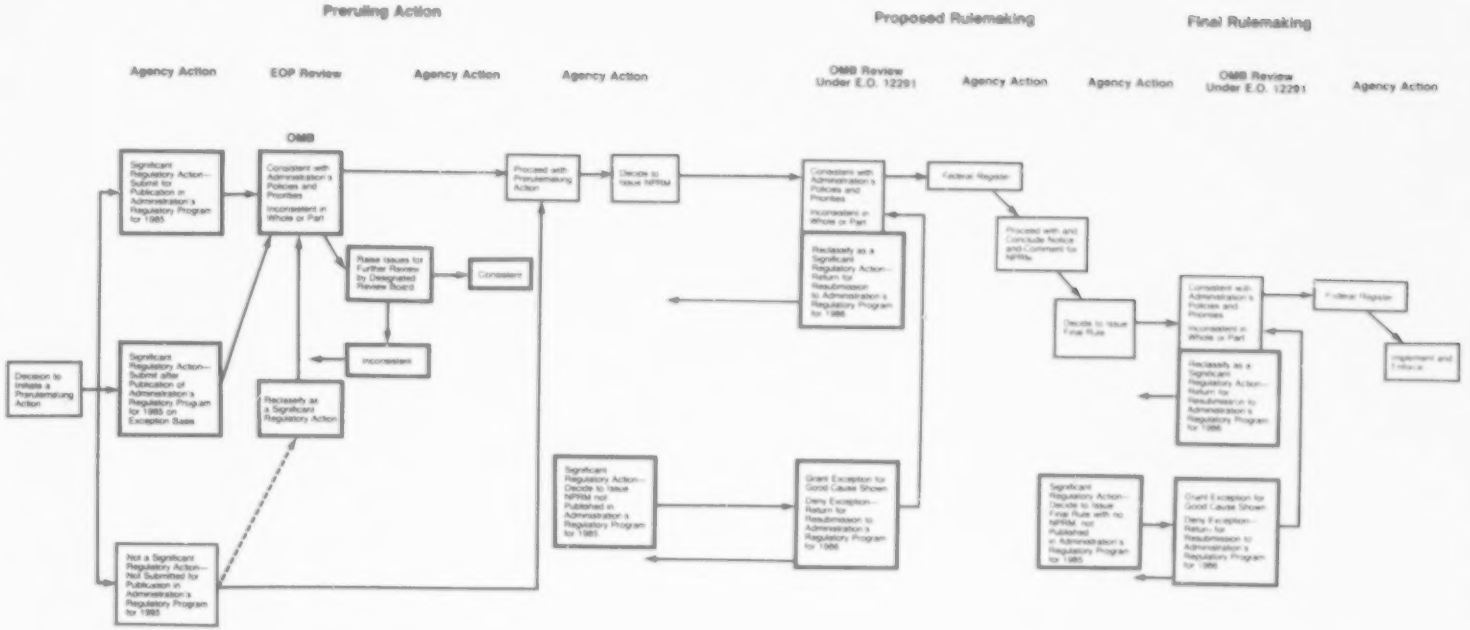
APPENDIX C

Administration Review of Agency Regulatory Programs


Prerulling Action
Proposed Rulemaking
Final Rulemaking
Agency Action
EOP Review
Agency Action
Agency Action
OMB Review Under E.O. 12291
Agency Action
Agency Action
OMB Review Under E.O. 12291
Agency Action
OMB
Significant Regulatory Action--Submit for Publication in Administration's Regulatory Program for 1985
Consistent with Administration's Policies and Priorities
Inconsistent in Whole or Part
Proceed with Prerulemaking Action
Decide to Issue NPRM
Consistent with Administration's Policies and Priorities
Inconsistent in Whole or Part
Federal Register
Raise Issues for Further Review by Designated Review Board
Consistent
Reclassify as a Significant Regulatory Action--Return for Resubmission to Administration's Regulatory Program for 1986
Proceed with and Conclude Notice and Comment for NPRM
Decision to Initiate a Prerulemaking Action
Significant Regulatory Action--Submit after Publication of Administration's Regulatory Program for 1985 on Exception Basis
Inconsistent
Decide to Issue Final Rule
Consistent with Administration's Policies and Priorities
Inconsistent in Whole or Part
Federal Register
Implement and Enforce
Reclassify as a Significant Regulatory Action--Return for Resubmission to Administration's Regulatory Program for 1986
Reclassify as a Significant Regulatory Action
Significant Regulatory Action--Decide to Issue NPRM not Published in Administration's Regulatory Program for 1985
Grant Exception for Good Cause Shown
Deny Exception--Return for Resubmission to Administration's Regulatory Program for 1986
Significant Regulatory Action--Decide to Issue Final Rule with no NPRM not Published in Administration's Regulatory Program for 1985
Grant Exception for Good Cause Shown
Deny Exception--Return for Resubmission to Administration's Regulatory Program for 1986
Not a Significant Regulatory Action--Not Submitted for Publication in Administration's Regulatory Program for 1985

Flowchart illustrates Administration Review of Agency Regulatory Actions Under E.O. 12291

SOURCE: Office of Information and Regulatory Affairs, Office of Management and Budget